S. HRG. 101-925

NEGOTIATED RATES

HEARING

BEFORE THE

SUBCOMMITTEE ON SURFACE TRANSPORTATION

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

NEGOTIATED RATES

JULY 17, 1990

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NEGOTIATED RATES

TUESDAY, JULY 17, 1990

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON SURFACE TRANSPORTATION,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:15 a.m., in room SR-253, Hon. J. James Exon (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Robert Holleyman, staff counsel; Sheryl Washington, professional staff member; and Alan Maness, minority staff counsel.

OPENING STATEMENT BY SENATOR EXON

Senator EXON. The subcommittee will come to order.

On June 21, 1990, the United States Supreme Court issued a decision in the case of *Maislin Industries* v. *Primary Steel,* which invalidated the negotiated rates policy of the Interstate Commerce Commission. It has been estimated that several hundred million dollars in freight undercharge claims may now be at issue in light of *Maislin.*

Today's hearing is intended to focus on three issues: the impact of the Supreme Court decision, whether this poses a problem for which legislation is necessary, and if so, what is the best legislation to address this problem? Also subject to discussion will be the relationship between the filed tariff doctrine retained in the Motor Carrier Act of 1980 and the increase in the practice of negotiating rates that followed partial motor carrier deregulation.

Witnesses testifying this morning will express varying degrees of support for as well as opposition to legislation to address the issue of negotiated rates. These witnesses include the new Chairman of the ICC, Mr. Ed J. Philbin, and two panels of witnesses encompassing shippers, brokers, freight transportation consultants, carriers and creditors. I look forward to this testimony as we examine the impact of the recent Supreme Court decision on what, if anything, we should do about it in the form of legislation.

I am pleased now to yield to Senator Kasten, as the ranking member of the subcommittee, for any opening statement he might have.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. Mr. Chairman, thank you, and thank you for calling this important hearing. The negotiated rates controversy has put a strain on the relationship between shippers and carriers. Trade publication reports have estimated that the amount in dispute between shippers and carriers is around $200 million.

As a general proposition, it is best, I believe, if the parties to a dispute can negotiate their own solution. If negotiations fail, a regulatory solution is one option. Sometimes, however, a legislative solution is the only viable resolution of a dispute, and the negotiated rates controvery will require a legislative solution because the parties have not been able to resolve their disputes without extensive costly litigation, and the Supreme Court's recent Maislin decision has severely limited the ICC's ability to craft a regulatory solution.

Today's hearing should provide us the information we will need to craft a legislative solution to the negotiated rates controversy. The major parties are here—the shipping groups, the motor carriers, the bankruptcy trustees—and the parties' written statements indicate that a number of them have already reached a consensus on a proper legislative remedy, and for that I commend them.

Again, Mr. Chairman, thank you for calling this important hearing. I regret, because of previous commitments I am going to have to leave here shortly before 10:00 a.m., but I look forward to working with you in reviewing the testimony and in crafting legislation.

Senator EXON. Thank you very much, Senator Kasten, for your help and consideration and counsel, it, of course, is very much appreciated. We also have, as we start the hearing this morning, Senator Burns from Montana with us, another important member of the Subcommittee. Do you have any opening statement, Senator Burns?

Senator BURNS. Not really, Mr. Chairman. I want to commend you for holding these hearings, though. This is our first exposure to this issue, and it is clear that since that Supreme Court decision, that some clarification of congressional intent behind the 1980 Motor Carrier Act needs to be made.

So I would just withhold my statement, Mr. Chairman. I am anxious to hear the witnesses, and I hope we can—I would like to associate my words with Senator Kasten. Sometimes a negotiated settlement is the best, and then a legislative approach would not be in order if they can negotiate it out.

So I thank you for holding these hearings, and I look forward to hearing from the witnesses. Thank you.

Senator EXON. Thank you, Senator Burns.

I am now very pleased to welcome our first witness this morning, Chairman Edward Philbin, the Chairman of the Interstate Commerce Commission, and before you begin, Chairman Philbin, let me thank you on behalf of the Chairman and the other members of this Subcommittee for the excellent working relationship we have had with the Commission since you became Chairman of the Commission, and we are not always going to agree on policy, but you have been very forthcoming and I just want to give you an A+ for effort in the job that you have done thus far as Chairman of this very, very important regulatory Commission.

So with that I am very pleased to recognize you, Mr. Philbin, for your testimony.

STATEMENT OF HON. EDWARD J. PHILBIN, CHAIRMAN, INTERSTATE COMMERCE COMMISSION

Mr. PHILBIN. Thank you very much, Mr. Chairman, for your kind remarks—and Senator Burns, Senator Kasten.

Thank you for the opportunity to present the views of the Interstate Commerce Commission concerning negotiated rates for interstate shipments via motor common carriers of property. The June 21, 1990 decision of the U.S. Supreme Court in *Maislin Industries, U.S. Inc.* v. *Primary Steel, Inc.*, has focused considerable attention on this issue. That decision struck down the Commission's policy of relieving shippers of the obligation to pay filed tariff rates where carriers had failed to file lower tariffs reflecting the rates negotiated with, billed to, and paid by the shippers.

While the Supreme Court has thus addressed the legal authority of the Commission's decision, the Commission continues to believe that the equities of this situation clearly favor the shippers. The Commission is therefore supportive of a legislative remedy for the problem faced by the shipping community in the wake of *Maislin*, and stands ready to provide whatever support is needed to assist the Subcommittee in deliberations on these issues.

In this regard, we are recommending several changes to the bill described in our written testimony to make it clear that the Commission would have jurisdiction to determine that application of tariff rates or charges is unlawful where the Commission finds that the carrier has engaged in an unreasonable practice by attempting to collect rates in addition to those originally negotiated, billed and collected.

The statutory and regulatory framework of the negotiated rates issue is straightforward. Motor common carriers are required by 49 United States Code 10761 to file tariffs setting forth charges for all transportation services and to collect only the published tariff rates. The Interstate Commerce Act also contains a requirement in 49 United States Code 10701 that carriers' practices be reasonable.

Prior to 1980, the tariff-filing requirement of Section 10761 was applied strictly. In a series of cases decided under the Interstate Commerce Act in the early part of this century, the Supreme Court developed principles that later became known as the "filed rate" doctrine. That precept dictates that when a carrier files an action in court seeking to recover unpaid tariff charges, the court may not entertain any defense based on the carrier's misquotation of the tariff rate or the shipper's ignorance of that rate.

A primary purpose of the filed rate doctrine, as enunciated by the Supreme Court, was reinforcement of the statutory prohibition against rate discrimination. The 1980 enactment of the Motor Carrier Act substantially revised the transportation policy of the United States by encouraging a more competitive environment in the motor carrier industry.

That act significantly relaxed restrictions on entry into the motor carrier industry, and permitted carriers to operate as both common carriers and contract carriers, thereby enabling carriers to

tailor rates to meet the needs of individual shippers. In this atmosphere of eased entry, vigorous price competition ensued. The Commission responded by changing its tariff regulations to permit rate reductions on one day's notice and to allow carriers to establish rates for named shippers.

As a consequence of these changes, it became common practice for carriers and shippers to negotiate the rates charged for particular transportation services. Typically, carriers and shippers agreed upon a rate and other pertinent terms and conditions. The shipper tendered a rate to the carrier in reliance upon the agreed terms, and the carrier billed the shipper and received payment at that negotiated rate.

Some motor common carriers, however, did not always comply with the statutory tariff-filing requirements. As long as the carrier remained a going concern, these derelictions generally went unnoticed. However, when a carrier filed for bankruptcy, the receiver or trustee frequently retained an auditor to search the records of the carrier for instances in which the rates billed and collected were lower than the applicable rates on file at the Interstate Commerce Commission. When these discrepancies were discovered, the receiver or trustee then filed a collection action to recover the difference from the unsuspecting shipper.

Rising numbers of motor carrier bankruptcies in recent years, as well as multiple claims attributable to individual carriers, increased significantly the number of collection actions. As these actions to recover unpaid tariff charges on behalf of bankrupt carriers became more common, shippers requested that the ICC address the problem.

In response, the ICC adopted two policy statements designed to address the practice of carrier failure to file negotiated rates. Although the filed-rate doctrine prohibited courts from considering equitable defenses to carrier undercharge actions, the Commission concluded that the doctrine did not preclude the ICC from exercising its regulatory powers to ensure that carrier billing practices were reasonable.

The Commission announced that in carrier actions to collect unpaid tariff charges it would conduct an advisory analysis on referral from the court, determine whether collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice, and if a negotiated rate were found to exist, determine whether this amount was all the carrier should be permitted to collect.

The Commission reiterated the duty of carriers to charge the tariff rate, but explained that an inflexible policy of enforcing the filed rate when a carrier had negotiated a lower rate with the shipper, but had failed to file that rate in a tariff, would frustrate the intent of the Congress as expressed in the national transportation policy to encourage pricing innovation, since it could chill rate negotiation between shippers and carriers and inhibit legitimate pricing initiatives.

The *Maislin* case, on its facts, followed this pattern. The carrier, Maislin, made about 1,100 shipments of steel for the shipper, Primary Steel, under rates negotiated with Maislin. Maislin never filed these rates with the Commission, despite an understanding

that it would do so. Following Maislin's bankruptcy, an auditor appointed by the bankruptcy court claimed that Maislin's actual filed tariff rates were higher than the rates charged to Primary, and Maislin brought a suit in federal district court to recover about $185,000 in alleged undercharges.

The court referred the dispute to the Commission, which found that that Maislin's solicitation and billing practices were unreasonable, and determined that Primary should not be required to pay additional charges for the difference between the lower negotiated rates and the higher tariff rates. The district court granted summary judgment in favor of Primary, and the Court of Appeals for the 8th Circuit affirmed that decision.

The Supreme Court, however, granted certiorari and issued its opinion on June 21, 1990, holding that the Commission's negotiated rates policy was inconsistent with the Interstate Commerce Act and is therefore invalid. The majority concluded that the Commission's justification for authorizing this departure from the filed rate tariff schedule was contrary to the language and structure of the statute as a whole, and the requirements of the filed-rate doctrine in particular.

Now, the effect of the Supreme Court's decision is farreaching. As of June 28 this year, the Commission had 105 claims pending before it with a dollar value of over $4.8 million. 45 cases are being held in abeyance at the request of the parties and the record is not yet closed on 31 cases. The balance are in some stage of preparation or in the voting process which has now been suspended.

The *Maislin* decision precludes the Commission from applying an unreasonable practices theory to resolve the cases pending before it. Furthermore, these cases represent only a fraction of the potential negotiated rates change that could be brought. The Commission is unable to identify all potential claims which may not yet have been brought in federal district court, or if brought, may not yet have been referred to the Commission. However, the trade press estimates that the total universe of claims could total as much as $200 million.

The Supreme Court left open the possibility that the Commission could find that the tariff rate was unreasonable and thereby preclude the carrier or the bankruptcy trustee from collecting the difference between the filed and the negotiated rate. However, this approach may prove unworkable for several reasons.

Since 1980, motor carrier industry rates have been disciplined through competition, not through regulatory standards. Thus, this approach seems inconsistent with the concerns expressed by Congress in enacting the Motor Carrier Act of 1980, which was intended to provide for less Government regulation and to spur competition in both service and pricing.

Practical considerations also mitigate against the rate reasonableness approach. Individual determinations of reasonableness would be required for each tariff rate in question. As a result, shippers would have to undergo the considerable expense of litigating each of these rates before the Commission.

In the Commission's view, the equities of this situation lie with the shippers who thought they had entered into binding arrangements with carriers for transportation services but who are none-

theless, after Maislin, held strictly liable for any difference between the filed and the negotiated rates. However, as the Supreme Court noted, equitable defenses—that is, those based on a carrier's failure to file a negotiated rate—cannot be asserted in an action to recover on the basis of a filed rate.

The prospect of successful administrative or judicial proceedings to protect shippers' interests thus appears uncertain, and any such proceedings will obviously be costly to the litigants. The Commission therefore recommends that remedial legislation be enacted as quickly as is feasible.

The Commission supports the approach taken in H.R. 3243, which clarifies the existence of the Commission's primary jurisdiction to determine whether motor carrier and freight forwarder solicitation and billing practices are unreasonable, and therefore unlawful under the act. As our written testimony indicates, we believe several modifications to the text are needed for the bill to provide an effective resolution to pending and potential claims.

The Commission's expression of support is not an endorsement of additional regulatory authority, or a suggestion that new policies be adopted. I personally view this proposal as an additional expression of the goals emphasized in the Motor Carrier Act of 1980, which directed the Commission to promote competitive and efficient transportation services.

I understand that the Department of Transportation also supports legislation and offers several other options involving decreased economic regulation such as the possibility that only minimum rates, or only collectively set rates, would be filed with the Commission. I believe these options could also provide solutions to the negotiated rates problem, and the Subcommittee may wish to consider them either in the context of the issue before it today, or in the future.

Mr. Chairman, that concludes my statement. I would be pleased to answer any questions you might have.

[The statement and questions and answers follow:]

TESTIMONY OF EDWARD J. PHILBIN, CHAIRMAN
INTERSTATE COMMERCE COMMISSION
BEFORE THE SENATE COMMITTEE ON COMMERCE, SCIENCE AND
TRANSPORTATION, SUBCOMMITTEE ON SURFACE TRANSPORTATION
JULY 17, 1990

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to present the views of the Interstate Commerce Commission (ICC) concerning negotiated rates for interstate shipments via motor common carriers of property. The June 21, 1990 decision of the U.S. Supreme Court in Maislin Industries, U.S. Inc. v. Primary Steel, Inc., 110 Sup. Ct. 884 (1990) has focused considerable attention on this issue. That decision struck down the Commission's policy of relieving shippers of the obligation to pay filed tariff rates where carriers had failed to file lower tariffs reflecting the rates negotiated with, billed to, and paid by the shippers. While the Supreme Court has thus addressed the lawfulness of the Commission's decision, the Commission continues to believe that the equities of this situation clearly favor shippers. The Commission is therefore supportive of a legislative remedy for the problems faced by the shipping community in the wake of Maislin, and stands ready to provide whatever support is needed to assist the subcommittee in deliberations on these issues. In this regard, we recommend several changes, described below, to

the text of the bill to make it clear that the Commission would have jurisdiction to determine that application of tariff rates or charges is unlawful where the Commission finds that the carrier has engaged in an unreasonable practice by attempting to collect rates in addition to those originally billed and collected.

Background

The statutory and regulatory framework of the negotiated rates issue is straightforward. Motor common carriers are required by 49 U.S.C. 10761 to file tariffs setting forth charges for all transportation services and to collect only the published tariff rates.[1] The Interstate Commerce Act (Act) also contains a requirement (49 U.S.C. 10701) that carriers' practices be reasonable.

Prior to 1980, the tariff-filing requirement of Section 10761 was applied strictly. In a series of cases decided under the Interstate Commerce Act in the early part of this century, the Supreme Court developed principles that later became known as the "filed rate" doctrine. That precept dictates that when a carrier files an action in court seeking to recover unpaid tariff charges, the court may not entertain any defense based on the carrier's misquotation of the tariff rate or the shipper's ignorance of that rate. A primary purpose of the filed rate doctrine, as enunciated by the Court, was reinforcement of the

[1] As discussed below, contract rates are an exception to this requirement.

statutory prohibition against rate discrimination.

The 1980 enactment of the Motor Carrier Act, Pub. L. No. 96-296 (MCA) substantially revised the transportation policy of the United States by encouraging a more competitive environment in the motor carrier industry. The ICC was directed, in regulating motor carriers, to promote competitive and efficient transportation services in order to "(A) meet the needs of shippers ... [and] (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and travelling public." 49 U.S.C. 10101(a)(2). The MCA significantly relaxed restrictions on entry into the motor carrier industry, and permitted carriers to operate as both common carriers and contract carriers, thereby enabling carriers to tailor rates to meet the needs of individual shippers. In this atmosphere of eased entry vigorous price competition ensued. The Commission responded by changing its tariff regulations to permit rate reductions on one day's notice and to allow carriers to establish rates for named shippers.

As a consequence of these changes, it is common practice today for carriers and shippers to negotiate the rates charged for particular transportation services. Typically, carriers and shippers will agree upon a rate and other pertinent terms and conditions, the shipper will tender freight to the carrier in reliance upon the agreed terms, and the carrier will then bill the shipper and receive payment at the negotiated rate. Until recently, the shippers generally assumed, or in some cases were

expressly told, that the carriers would incorporate the negotiated rates in tariffs that would be properly filed with the ICC as required by statute.

Some motor common carriers, however, did not always comply with the statutory tariff filing requirements. As long as the carrier remained a going concern, these derelictions generally went unnoticed. However, when a carrier filed for bankruptcy, the receiver or trustee frequently retained an auditor to search the records of the carrier for instances in which the rates billed and collected were lower than the applicable rates on file at the ICC. When these discrepancies were discovered, the receiver or trustee then filed a collection action to recover the difference from the unsuspecting shipper. Rising numbers of motor carrier bankruptcies in recent years (as well as multiple claims attributable to individual carriers) increased significantly the number of collection actions.

As these actions to recover unpaid tariff charges on behalf of bankrupt carriers became more common, shippers requested that the ICC address the problem. In response, the ICC adopted a policy statement, Negotiated Rates I,[2] designed to address the practice of carrier failure to file negotiated rates. In that statement, the Commission indicated its intention to accommodate the traditional antidiscrimination goals of the Act with

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[2] *National Industrial Transportation League - Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986).

Congress' emphasis (in the MCA) on competition and the marketplace consequences that competition had engendered. Although the filed rate doctrine prohibited courts from considering equitable defenses to carrier undercharge actions, the Commission concluded that the doctrine did not preclude the ICC from exercising its regulatory power[3] to ensure that carrier billing practices are reasonable. The Commission reiterated the duty of carriers to charge the tariff rate, but explained that an inflexible policy of enforcing the filed rate when a carrier had negotiated a lower rate with a shipper, but had failed to file that rate in a tariff, would frustrate the intent of the Congress (as expressed in the national transportation policy, 49 U.S.C. 10101) to encourage pricing innovation, since it could chill rate negotiation between shippers and carriers and inhibit legitimate pricing initiatives. The Commission announced that in carrier actions to collect unpaid tariff charges, it would conduct an advisory analysis on referral from a court, to determine whether collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice, and, if a negotiated rate were found to exist, whether this amount was all the carrier should be permitted to collect.

Some federal district courts viewed the Negotiated Rates I policy statement as simply offering to render a non-binding advisory analysis on the issues, and concluded that referral of

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[3] Under 49 U.S.C. 10701(a) and 10704(b)(1).

cases to the Commission would be incompatible with the filed rate doctrine. To clarify its policy (and in response to a petition from a shipper association), the Commission issued a second statement on the issue (Negotiated Rates II).[4] That statement reaffirmed that the ICC's source of authority for its negotiated rates policy was the statutory requirement that a carrier's practices must be reasonable.

The Maislin Opinion

In the Maislin case, a division of Maislin Industries, U.S., operating as an ICC-licensed carrier, made 1,081 shipments of steel for Primary Steel, Inc. (Primary). Primary negotiated rates with Maislin for this transportation, and Primary understood that Maislin would file the negotiated rates in tariffs with the ICC. Despite that understanding, Maislin failed to file the negotiated rates in proper tariffs. Following Maislin's bankruptcy, an auditor appointed by the bankruptcy court claimed that Maislin's actual filed tariff rates were higher than the rates charged to Primary. Maislin brought suit in federal district court to recover $187,923.36 in alleged undercharges.

The court referred the dispute to the Commission, which rejected Maislin's argument that an unreasonable-practice

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[4] *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989).

determination in the circumstances of this case would violate the filed rate doctrine. The Commission noted that "in today's more flexible pricing atmosphere, . . . penalizing a shipper for the mistakes of a carrier may be unnecessary to deter discrimination" and would "frustrate[] the intent of the national transportation policy to encourage pricing innovation." The Commission emphasized that it was "not abolishing the requirement [in 49 U.S.C. 10761] that carriers must continue to charge the tariff rate." Nevertheless, the Commission found that its "jurisdiction over unreasonable practices gives us discretion to find that the tariff rate filed by motor carriers need not and should not be applied in a particular case," explaining that it was authorized under 49 U.S.C. 10701(a) and 10704 "to consider all the circumstances surrounding an undercharge suit." The Commission found that Maislin's solicitation and billing practices were unreasonable, and that Primary should not be required to pay additional charges for the difference between the lower negotiated rates and the higher tariff rates.

The district court granted summary judgment in favor of Primary, and the Court of Appeals for the Eighth Circuit affirmed. The Supreme Court granted certiorari, heard oral argument on April 16, 1990 and issued its opinion on June 21, 1990. The Court held that the Commission's negotiated rates policy is inconsistent with the Interstate Commerce Act and is therefore invalid. Justice Stevens and Chief Justice Rehnquist dissented.

The majority concluded that the Commission's justification for authorizing this departure from the filed tariff schedule was contrary to the language and structure of the statute as a whole and the requirements of the filed rate doctrine in particular. The Court stressed that the practice of applying rates different from those contained in tariffs permitted discrimination that the Act by its terms seeks to prevent.

The Court was unconcerned that a carrier that failed to file a tariff reflecting the lower negotiated rate could receive a windfall due to its omission. The Court stated that such equities were not relevant to application of the Act's requirement that transportation be provided only under tariff rates, and stressed that compliance with sections 10761 and 10762 was utterly central to administration of the Act.

The Court also rejected the Commission's argument that passage of the MCA justifies the Negotiated Rates policy. The Court recognized that there had been a marked relaxation of the regulatory scheme in existence prior to 1980. However, the Court interpreted the Negotiated Rates policy as being in direct conflict with the Act, and thus concluded that Negotiated Rates was invalid.

Justice Stevens' dissent (in which Justice Rehnquist joined) focused on the majority's "failure to appreciate the significance of the 'sea change' in the statutory scheme that. . . converted a regime of regulated monopoly pricing into a highly competitive

market."[5] In the dissenters' view, the Commission had faithfully followed its statutory grant of authority. The dissent viewed the MCA's changes in the National Transportation Policy (49 U.S.C. 10101) as a reflection of changing legislative goals. It concluded that in the more competitive, less regulated environment under the MCA, "strict mechanical adherence to the filed rate doctrine produces absurd results and serves no social purpose."[6] The dissenters would also have given greater deference to the Commission's interpretation of its governing statute.

Effect of the Maislin Decision

The Commission had 105 claims pending before it as of June 28, 1990, with a dollar value of over $4.8 million.[7] Of these, 41 are court-referred cases and 64 were filed directly with the Commission. Forty-five cases are being held in abeyance at the request of the parties, and the record has not yet closed in 31 cases. The balance are in some stage of preparation or in the voting process (which has now been suspended.) Of the 105 cases, at most 20 involve issues other than unreasonable practices. After Maislin, the Commission cannot apply an unreasonable practices theory to resolve the remaining 85 pending cases.

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[5] Dissent, slip op. at 1-2.

[6] Dissent, slip op. at 13.

[7] This figure is understated somewhat because it does not include claims for which the amount at issue is unclear.

Furthermore, these 85 cases represent only a fraction of the potential negotiated rates claims that could be brought. The Commission is not capable of identifying all potential claims (which may not yet have been brought in federal district court, or if brought, may not yet have been referred to the Commission.) However, the trade press estimates that the total universe of claims could total as much as $200,000,000.

The Supreme Court left open the possibility that the Commission could find that the tariff rate was unreasonable, and thereby preclude the carrier (or the bankruptcy trustee) from collecting the difference between the filed and the negotiated rate.[8] However, this approach may prove unworkable for several reasons. Since 1980, motor carrier industry rates have been disciplined through competition, not through regulatory standards. Thus, this approach seems inconsistent with the concerns expressed by Congress in enacting the Motor Carrier Act of 1980, which was intended to provide for less government regulation and to spur competition in both service and pricing.[9]

Practical considerations also mitigate against the rate reasonableness approach. Individual determinations of reasonableness would be required for each tariff rate in question; as a result, shippers would have to undergo the

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[8] The court specifically stated (Majority op. at 11 n.10): "The issue of the reasonableness of the tariff rate is open for exploration on remand."

[9] H.R. Rep. No. 96-1069, 96th Congress, 2d Sess. 2307 (1980).

considerable expense of litigating each of these rates before the Commission.

In the Commission's view, the equities of this situation lie with the shippers, who thought they had entered into binding arrangements with carriers for transportation services but who are nonetheless, after Maislin, held strictly liable for any difference between the filed and the negotiated rate. However, as the Supreme Court noted, equitable defenses (i.e., those based on carriers' failure to file the negotiated rate) cannot be asserted in an action to recover on the basis of a filed rate.[10] For the reasons outlined above, the prospect of successful administrative or judicial proceedings to protect shippers' interests appears uncertain, and any such proceedings will be costly to the litigants. The Commission therefore recommends that remedial legislation be enacted as quickly as is feasible.

Comments on H.R. 3243

The Commission supports the approach taken in H.R. 3243, which clarifies the existence of the Commission's primary jurisdiction to determine whether motor carrier and freight forwarder solicitation and billing practices are unreasonable, and therefore unlawful under the Act. The Commission's expression of support is not an endorsement of additional regulatory authority, or a suggestion that new policies be

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[10] Majority, slip op. at 11.

adopted. Rather, the Commission views this proposal as an additional expression of the goals emphasized in the Motor Carrier Act of 1980, which directed the Commission to promote competitive and efficient transportation services.

As now drafted, H.R. 3243 does not affirmatively give the Commission authority to determine that collection of tariff rates would be unlawful, where the Commission finds that a carrier has engaged in an unreasonable practice by seeking to collect rates in addition to those originally billed and collected. In order for the bill to work a solution to the problems faced by the shipping community as a result of the Maislin decision, we recommend the following changes:

1) On line 3 of the bill, add the following new provision (and renumber subsequent provisions):

"SECTION 1. AUTHORITY FOR COMMISSION TO MAKE DETERMINATIONS REGARDING UNREASONABLE PRACTICES.

(a) Section 10761 of title 49, United States Code, is amended by adding a new subsection (c), to read as follows:

Notwithstanding the provisions of subsection (a), the Commission may determine that application of the tariff rates or charges is unlawful where it finds that the carrier has engaged in an unreasonable practice in violation of Section 10701 of this subtitle.

(b) Redesignate existing Section 10761(c) as 10761(d)."

2) On page 2, lines 5 and 6, delete the phrase "a person may assert" and add the phrase "the Commission may find, on application".

3) On page 2, line 9, place a period after the word "subtitle" and delete the remainder of that sentence.

4) On page 4, delete lines 9-14, and replace them with the following:

> "Except as provided in subsection (a) and Section 10761(c), motor carriers shall not be relieved of the duty to file rates, rules, and classifications as required in section 10761(a) and 10762."

Existing Section 1 would confirm the Commission's primary jurisdiction over allegations that retroactive collection of a tariff rate would be an unreasonable practice or otherwise violate the Act. This section of the bill covers the typical case in which a motor carrier initially bills and accepts payment at a negotiated rate that is not properly filed in a tariff, and later seeks payment of additional charges based on the actual filed tariff.

In addition to the typical case, Section 1 would cover tariff notation cases, such as Carriers Traffic Service, Inc. v. Anderson, Clayton & Co., 881 F.2d 475 (7th Cir. 1989) (whether shipper's failure to note on bill of lading that it loaded and counted the freight meant that a higher tariff rate applied). This section would also establish the Commission's primary jurisdiction over cases involving retroactive application of loss-of-discount provisions for failure to pay transportation charges within the time allowed by the Commission's credit regulations, e.g., ICC Docket No. MC-C-30135, Mennen Company v.

Campbell 66 Express, Inc., (not printed), served September 6, 1989.

We note that Section 1 by its terms also covers allegations of statutory violations when a nonhousehold goods freight forwarder seeks to collect tariff-based rates or charges in addition to those originally billed and collected. The requirement that nonhousehold goods freight forwarders publish their rates in tariffs ended on December 21, 1986, the effective date of the Surface Freight Forwarder Deregulation Act of 1986, Pub. L. 99-251, 100 Stat. 2993. Therefore, we assume that the bill intends to require courts to refer such allegations only as to shipments delivered on or before December 20, 1986.

Section 2 would shorten the statute of limitations for civil actions filed by motor common carriers to recover undercharges, or by shippers to recover overcharges. We commend the shortening of the limitations period because it is evenhanded and should provide a faster resolution of claims concerning transportation charges.

Allowing motor carriers and shippers to resolve overcharge and undercharge claims by mutual consent, as provided in Section 3, is a useful tool. In cases where the parties agree that there has been either a billing error or a ministerial error in establishing the tariff, or that it would be unreasonable to charge the filed rate retroactively, the parties would be excused from the requirements of Section 10761 and 10762 to charge and pay only the filed rate. The provision for Commission review

allows oversight to prevent this section from being used unlawfully to favor certain shippers over others.

Section 4 of the bill is helpful because it should foreclose litigation on whether the standards contained in H.R. 3243 should apply to existing cases. Because the bill does not apply to claims that have already been finally resolved, the word "retroact[ive]" is not an accurate description of the intent of this provision. We therefore recommend deletion of the word "retroactive" from the title of the subsection.[11]

Finally, we think it would be helpful for the legislative history of H.R. 3243 or any similar legislation to clearly state that its purpose is to overrule Maislin.[12] It would also be helpful for that history to indicate that the bill is meant to clarify existing law, rather than to make a substantive change.

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[11] In any event, the heading of Section 4(b) as introduced contains a typographical error (the word "retroaction" instead of "retroactive").

[12] We recommend that the committee report include the explicit statement that "This [legislation] is intended to overrule the decision of the Supreme Court in Maislin Industries, U.S. Inc. v. Primary Steel, Inc., 110 Sup. Ct. 884 (1990)."

BEFORE THE SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, SUBCOMMITTEE ON SURFACE TRANSPORTATION

SEPARATE EXPRESSION OF COMMISSIONER LAMBOLEY, JOINED BY COMMISSIONER SIMMONS

July 17, 1990

Because of an evident pattern of conduct, we believe that the Commission acting on its own initiative, should commence enforcement-related investigations under Chapter 117, Title 49 of the U. S. Code, more specifically 49 U.S.C. § 10701, to determine whether and with what frequency, the carriers now in bankruptcy seeking to recover tariff-based charges, knowingly and willfully undertook to charge and receive compensation for transportation services other than the tariff-filed rates, in violation of 49 U.S.C. §§ 10761-10762, and if so, what are the appropriate civil or criminal sanctions to be applied under Chapter 119, Title 49 of the U.S.C.Code, more specifically 49 U.S.C. §§ 11903 11904, and 11914-16.

In addition, the Commission should notify the Bankruptcy Courts in each instance of the planned investigation of the bankrupt carrier.

In my view, this action represents an appropriate Commission supplemental initiative in light of the Maislin decision.

Questions of Chairman Ernest F. Hollings

ICC Enforcement

1) Opponents of negotiated rates legislation have argued that adoption of legislation would serve merely to insulate the ICC from its past failure to enforce tariff filing requirements. What is your response to this? What is the ICC currently doing to enforce filing requirements?

Answer:

Legislation is now under consideration by Congress because shippers are seeking relief from undercharge claims, not because the legislation would have a particular impact on the Interstate Commerce Commission. In the absence of legislation, bankrupt carriers, in collecting undercharges from shippers, will be able to take advantage of their past failures to file rates.

Carriers and shippers are entirely free, and are encouraged, to negotiate their transportation arrangements. Once negotiations conclude, it is incumbent on carriers to validate the agreement through tariff filing. Absent an alert from affected shippers, it is virtually impossible for the Commission even to be aware of rates not filed with the Commission. The Maislin decision dramatically reminded shippers of their risk when carriers fail to meet their tariff filing responsibility.

In terms of enforcement, Commission personnel, upon complaint, examine tariffs to determine if the correct freight rate and pertinent rules have been correctly applied. Where errors are discovered, the staff attempts to resolve the matter administratively with the carrier to ensure that proper tariff rates are applied. The Commission can reject tariffs prior to their effective date for failure to comply with Commission regulations, and can issue show cause orders where specific tariff provisions are indefinite or subject to misinterpretation. In addition, the Commission's field staff, in conducting its routine compliance monitoring program, samples shipper freight bills. Where discrepancies are found, the carrier is contacted to ensure that correct tariff charges are assessed.

Finally, the Commission's recently revised OP-1 licensing form specifically highlights applicants' tariff-filing responsibilities and procedures. Also, the Commission informs motor common carrier applicants during their licensing proceedings that they must comply with the Commission's tariff regulations prior to initiating operations.

Answer of Commissioner Lamboley joined by Commissioner Simmons:

We believe that, because of an evident pattern of conduct, the Commission acting on its own initiative, should commence enforcement-related investigations under Chapter 117, Title 49 of the U. S. Code, more specifically 49 U.S.C. § 10701, to determine whether and with what frequency, the carriers now in bankruptcy seeking to recover tariff-based charges, knowingly and willfully undertook to charge and receive compensation for transportation services other than the tariff-filed rates, in violation of 49 U.S.C. §§ 10761-10762, and if so, what are the appropriate civil

or criminal sanctions to be applied under Chapter 119, Title 49 of the U.S.C. Code, more specifically 49 U.S.C. §§ 11903, 11904, and 11914-16. Further, we believe the Commission should, in each instance, notify the Bankruptcy Courts of our investigation of the bankrupt carrier. In our view, this action represents an appropriate Commission initiative in light of the Maislin decision.

Alternative Defenses

2) The Supreme Court struck down the ICC's attempt to apply an "unreasonable practice" defense to undercharge claims. It has been suggested that these cases now will be challenged on the reasonableness of the rates themselves. Please elaborate about the practicality of rate reasonableness determination as a remedy.

Answer:

Although the Supreme Court left open the possibility that a shipper could challenge an undercharge claim on the basis that the underlying rate was unreasonable, this procedure is not a desirable alternative to legislation. Each rate must be evaluated individually by the Commission, and the Commission proceeding will be expensive and time-consuming for the litigants. In many instances, the cost of the litigation could exceed the amount of the disputed claim. If industry estimates of the amount of disputed claims are correct, thousands of potential cases could exist, which would take several years for the Commission to process.

Rate Discrimination

3) Retention of tariff filing requirements in passage of the Motor Carrier Act of 1980 was intended to prevent rate discrimination among shippers. Do you feel this goal would be adversely affected by passage of legislation along the lines recommended by the Commission or by a negotiated rates policy such as that previously endorsed by the Commission?

Answer:

No. Despite the fact that an average of over 1 million motor carrier tariff filings are made at the Commission annually, no discrimination cases have been litigated before the Commission since 1980. Because shippers do not seem to be relying on Commission proceedings to prevent or remedy unreasonable discrimination in rates, it is unlikely that passage of legislation along the lines recommended by the Commission will adversely affect Congress' interest in preventing unreasonable discrimination. Furthermore, carriers and shippers have the option, under the Interstate Commerce Act, of using contract rates, which are not subject to discrimination claims, and this option is widely used by motor carriers and shippers. In addition, the increased competition among carriers that has

resulted since the Motor Carrier Act of 1980 has all but eliminated the possibility of price discrimination.

Questions of Senator Larry Pressler

1) What is the extent of the Interstate Commerce Commission's enforcement of tariff filings in the last five years?

Answer:

The Elkins Act is designed to prevent carriers from giving preferential treatment to influential shippers through the granting of rebates or other advantages. A carrier that provides such rebates or other advantages effectively deviates from the published tariff rate.

The list below shows the number of Elkins Act cases handled over the past five years. In some of these instances, Commission attorneys were able to resolve them; others were closed without action because there was no merit to the allegations; and other cases were forwarded to the appropriate United States Attorney's Office. The last column of the chart indicates cases handled by Commission attorneys in which carriers failed to adhere to the tariff requirements, but favoritism to certain shippers was not an issue. Over the last five years there were 85 of the latter types of cases, including the duplicate payment of freight charges. The table includes both motor and rail cases.

	Elkins Act Cases			Concluded by ICC Attorneys		
	Rail	Motor	Total	Rail	Motor	Total
1985	8	21	29	6	12	18
1986	2	3	5	1	1	2
1987	0	1	1	0	0	0
1988	0	3	3	0	0	0
1989	1	4	5	0	0	0

	Forwarded to U.S. Attorney			Other Types of Related Cases
	Rail	Motor	Total	
1985	2	9	11	24
1986	1	2	3	23
1987	0	1	1	17
1988	0	3	3	12
1989	1	4	5	9

2) If the ICC had enforced tariffs for the last ten years, would we have the problem we are here to address today?

Answer:

There are approximately 45,000 motor carrier companies, and on average a million motor tariff filings are made each year. There are many times more shipper-carrier transactions than there are tariff filings (because multiple shipments can be governed by the same tariff). Given this volume of activity, the ICC is not in a position to ensure that each negotiated agreement between shippers and carriers is validated by subsequent tariff filing by the carrier, or to enforce, on its own motion, the filing laws. The ICC necessarily must rely on complaints from parties who believe violations have occurred and base its enforcement activities on such complaints. Thus the problem would not be avoided and the only solution, given the Supreme Court's negation of the ICC's corrective action, is the proposed legislation.

3) How can the ICC protect shippers in South Dakota from discrimination by common carriers if the carriers can charge secret, negotiated rates without filing them for public inspection with the ICC?

Answer:

As the Supreme Court determined in Maislin, any common carrier rate, including one determined through negotiation between shipper and carrier, must be filed with the Commission in order to be lawful. Passage of S. 2933 or similar legislation would not eliminate the requirement that tariffs be filed with the Commission, nor would it delete from the Interstate Commerce Act the prohibition against unreasonable discrimination. If the Commission were to receive information or to detect on its own that a carrier was charging a rate which might unreasonably discriminate against a South Dakota shipper, the Commission's enforcement staff would investigate the matter immediately.

4) Does the ICC currently require rail carriers to file tariffs? If so, what is the ICC's reasoning for treating rail carriers different than trucking carriers?

Answer:

Rail carriers are required to file tariffs. In this respect, the ICC does not treat rail carriers differently from motor carriers, and the filed rate doctrine applies to all common carriers. With respect to negotiated rates cases, the Commission is not aware of any rail litigation in which rates allegedly quoted to the shipper were different than those published in tariffs by the carriers. One reason may be that unlike the motor carrier industry in recent years, there have been relatively few rail bankruptcies, and typically negotiated rates cases are brought by the estate of the bankrupt carrier. In addition, rail carriers may have made more extensive use of rate contracts (an alternative to the use of tariffs) than have motor carriers.

Response to question of Senator James Exon, transcript p. 23 line 17:

The list below shows the number of Elkins Act cases handled over the past five years. In some of these instances, Commission attorneys were able to resolve them; others were closed without action because there was no merit to the allegations; and other cases were forwarded to the appropriate United States Attorney's Office. The last column of the chart indicates cases handled by Commission attorneys in which carriers failed to adhere to the tariff requirements, but favoritism to certain shippers was not an issue. Over the last five years there were 85 of the latter types of cases, including the duplicate payment of freight charges. The table includes both motor and rail cases.

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1986	1	2	3	23
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1988	0	3	3	12
1989	1	4	5	9

Senator EXON. Mr. Philbin, thank you very much. Let us get this on the record so that we know for sure, and anyone reading this testimony would understand this issue as well.

As I understand it, the unfortunate decision by the court—and, of course, that is a matter of legal interpretation which we probably cannot argue with—but the bottom line conclusion that one has to draw from the Supreme Court's action is that if a company contracts with a carrier to haul goods and then the carrier does not file as prescribed by the act, after the fact someone can come back in and make the company pay the additional rate.

In essence, is that what that court decision said?

Mr. PHILBIN. Yes, sir, it is.

Senator EXON. It seems to be a matter of equity to me as a nonlawyer here on this matter. It seems to me that it is holding the company, the shipper, liable for what the carrier did not do. As a matter of fairness and practicality, it sounds way off base to me, and we will take a good look at the suggestions that you have made and what we are going to hear from the succeeding witnesses.

I was interested in your statement that you do not believe this is an attempt at reregulation. Are you saying, then, Mr. Philbin, that the corrective legislation that you and the Commission have endorsed that has been introduced in the House of Representatives simply would clarify what you feel was clearly intended when we enacted the legislation?

Mr. PHILBIN. That is correct, Mr. Chairman.

Senator EXON. Thank you very much. I have no further questions. Senator Kasten.

Senator KASTEN. Mr. Chairman, thank you.

On today's second panel a witness representing the unsecured creditors of a bankrupt trucking company will testify, at least in her prepared testimony, that the proposed legislation will require the ICC to review every tariff dispute, undercharge claim, and billing error, and will place an extraordinary administrative burden on the Commission.

You have had an opportunity to review H.R. 3243 and similar legislative proposals. Would this legislation place an administrative burden on the ICC, or would you be able to work within the parameters of the legislation?

Mr. PHILBIN. I think that there would be no undue burden on the Commission of an administrative nature. If this legislation is passed, of course, the first few cases which come before us will be decided at the Commission level. That will establish the parameters of the application of the act to an evidentiary case. Thereafter, any cases that would come in would probably be handled at least for the evidentiary portion by the administrative law judges who would normally do that type of thing anyway.

I would foresee that after the ICC decided the first few cases after legislation is enacted, other litigants as was mentioned here today, would probably sit down and negotiate their differences in light of the Commission's decision and its application of any legislation that might be passed, so I do not see that there would be an insuperable burden if this legislation was passed.

Senator KASTEN. H.R. 3243 also contains a provision that would shorten from three years to 18 months the time for claiming an undercharge or for claiming any overcharge on a freight bill.

Do you think it is good policy to shorten the time from three years to 18 months?

Mr. PHILBIN. I personally do believe that it is good policy. I think it gives everybody an incentive to get their differences settled as quickly as possible, and I think it is an evenhanded provision.

My experience in the practice of law is that the longer the statute of limitations, the longer people will delay bringing their problems to a head, and I think a short period is a good incentive to get people to negotiate their problems.

Senator KASTEN. Mr. Chairman, thank you. I have no further questions.

Senator EXON. Thank you, Senator Kasten.

Senator Burns.

Senator BURNS. I have no questions. Thank you, Mr. Chairman.

Senator EXON. Just a question or two before we close out your testimony. We will have some additional questions for the record, but in order to save time we would appreciate your responding as promptly as you can.

There are one or two questions that I would like to have your testimony on.

Carriers and some shipper organizations will testify this morning in favor of the termination of the negotiated rate provisions of any remedial legislation after 18 months unless Congress acts following a report by the ICC to extend the legislation. Could you comment one way or the other on this proposition?

Mr. PHILBIN. My personal opinion is that if the legislation is needed now and would be a good thing, that it would be a good thing 18 months from now. Perhaps all of these cases will go away because of the publicity that has been generated as a result of the Maislin decision, and perhaps all of the existing cases can be cleaned up with new legislative authority from the Congress, but these things may very well come up again in the future. People tend to forget, different players are involved in the business, and I think it is a good idea to leave the Commission with the tools to solve these or similar problems which may arise in the future.

We could, of course, after some 18-month period, look at how many cases were still being filed for our determination and make some kind of a report, and Congress could determine whether it was an ongoing problem or not. It just seems to me to be a very good standby tool to allow the Commission in the future to solve similar problems.

Senator EXON. My next question, then, I think is obvious. Does the Commission feel that there has been widespread or significant failure by the carriers to post rates as was evidenced by the fact that the lawsuit has been referenced?

Mr. PHILBIN. Sir, I cannot speak for my fellow commissioners but only for myself. From my discussions with people in the industry, it seems to me that people have not been aware of how important the filed rate doctrine could be and the fact that it still has legal validity as determined by the majority of the Supreme Court in this case.

I think perhaps some of the procedures of the carriers have gotten somewhat sloppy, as the Supreme Court in Maislin found. When the Commission decided this case, it did not find that there was any fraudulent activity or any willful or knowing intent not to file. It just slipped through the cracks. It just seems that there has been some loosening up of procedures by people in the industry probably as a result of the relaxed environment created by the Motor Carrier Act of 1980.

What was overlooked by many people, however, was that the file rate doctrine is ironbound. It is still on the books, and the Supreme Court took a very strict view of the law. It was a strict construction by the Supreme Court. As you said, I do not fault it as a legal analysis, but it seems to me that Justice Stevens and the Chief Justice in their dissent had a better feel for the more relaxed commercial environment in this industry.

Senator EXON. How would the ICC come of knowledge on the particular cases that brought about the lawsuit or other cases related thereto? I assume the answer is in routine inspection and investigation, so I assume the ICC does do those from time to time.

Mr. PHILBIN. In essence, we do spotchecks, because of limited resources and the fact that we are dealing with something like 45,000 carrier companies and on an average a million tariffs filed by motor carriers per year, each of which average about five pages. If we receive information, a tip as it were, that someone is using improper practices, of course, we would have our enforcement people out examining that immediately, but to try to police the whole industry on an ongoing basis is just not possible.

Senator EXON. Has the Commission to your knowledge received any, some or many "tips" about such practices?

Mr. PHILBIN. I would not put an adjective to it, Senator, but we do in fact receive tips from the industry about people following improper practices. Those usually involve more than inadvertence. They involve knowing, willful evasions of the law, et cetera, and those we immediately follow up.

Senator EXON. In such instances, what action has the ICC taken or what action can the ICC take under existing law?

Mr. PHILBIN. The ICC in those cases can in fact use its statutory authority to seek civil penalties and also to approach the U.S. attorney to file criminal charges if that is warranted against offenders.

Senator EXON. Has the ICC ever done that?

Mr. PHILBIN. Sir, I can only speak for the last four and a half months. During that period of time I do not believe we have, but I am sure that the ICC has done so in the past.

Senator EXON. It has occurred in the past?

Mr. PHILBIN. I am sure that it has, and I would supply that for the record.

Senator EXON. I would appreciate your doing that.

Senator Burns.

Senator BURNS. Would the Senator yield just for one question, Mr. Chairman.

How many cases do you think that are out there right now that would be similar to this *Maislin* case?

Mr. PHILBIN. Sir, I could not give you a number. The estimates, as I said, from the trade press, who talk to many more people than we do and to a broader cross section, estimate up to $200 million. That must mean thousands of cases.

Senator BURNS. Thank you.

Thank you, Mr. Chairman.

Senator EXON. Thank you.

And thank you, Chairman Philbin.

Mr. PHILBIN. Thank you very much, Mr. Chairman.

Senator EXON. We will now move on to the first panel. The first panel includes Mr. Richard N. Bona, National Industrial Transportation League; Mr. George Connolly Jr., President of the Health and Personal Care Distribution Conference; Mr. William J. Augello, Executive Director of the Transportation Claims and Prevention Council; Mr. Steven D. Fernlund, Chairman of the Legislative Committee of the Transportation Brokers Conference of America; and Mr. Robert E. Davis, President of the National Association of Freight Transportation Consultants.

Welcome to you, gentlemen. We are very glad that you are here this morning. If there is no agreed to first spokesmen, and I assume there is not, then we will start out with the first man on the list under panel one as I have it here in front of me. And I am pleased to recognize Mr. Bona.

STATEMENT OF RICHARD N. BONA, NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

Mr. BONA. Thank you, Mr. Chairman. It is a pleasure to be here this morning. My name is Richard N. Bona. I am Manager of Traffic for the United States Marketing & Refinance Division of Mobil Oil Corporation located in Fairfax, VA. And as the current Treasurer of the National Industrial Transportation League, I appear here today on behalf of the League. League Counsel Richard Fortin is accompanying me.

The League is here to respectfully request the Subcommittee's support for a legislative solution to a problem which will erode today's highly market oriented environment. This problem needlessly will add hundreds of millions of dollars to the country's freight bill without producing any benefit for our national transportation system.

The problem is caused by the Supreme Court's recent decision in *Maislin* v. *Primary Steel*, which overturned the Interstate Commerce Commission's guidelines addressing the negotiated rates problem. The practical result of this ruling is that thousands of shippers, most of them small or uninformed businessmen, again are prey to a handful of entrepreneurs, who, primarily for their own benefit, are engaged in an exploitation of certain provisions of the Interstate Commerce Act.

Under the IC Act, it is the carrier's duty and obligation to file with the Commission every rate it uses to transport goods. If the carrier fails to do so, or if it fails to fully inform a shipper of any technical obligations needed to qualify for the filed rate, the shipper can face after-the-fact claims by third parties who were not involved in the negotiation between a shipper and the carrier.

This liability can exist even in those instances where a carrier shows a shipper a sample tariff page, or where it makes assurances, sometimes in writing, that the appropriate filings were made with the ICC. While it is not fair that a carrier's misrepresentation creates a liability for the shipper, it is the law, a law recently reaffirmed by the Supreme Court.

Given the proliferation of rates and service options created by the 1980 Act, the Commission recognized that shippers need protection against unreasonable claims. Using its authority to protect shippers and carriers from unreasonable practices, the agency issued the Negotiated Rates Policy. This policy was especially beneficial to the thousands of small shippers who lack the transportation expertise to defend themselves.

This policy has worked well. It required the shipper to show that it acted in good faith in accepting a rate at issue. If a good faith showing could not be made, the shipper remained liable. Because of the points raised in the Maislin decision, the League and others must ask this Subcommittee and the Senate for help in assuring the Supreme Court that Congress did intend for the 1980 Motor Carrier Act to promote competition in market pricing, and that it did intend for the ICC to protect shippers and carriers from unreasonable practices.

This help requires the enactment of remedial legislation during the remaining days of this congressional session. To this end, we have provided your staff with a three-part proposal which has the support of both the shipper and carrier communities.

The first part of the plan clarifies the ICC's right to examine the reasonableness of undercharge claims by codifying the Negotiated Rates Policy. It also requires the filing of certain oversight reports.

The second part of the plan helps to reduce the future likelihood of these claims by reducing the time frame for the filing of these claims.

The third part allows the Commission to adopt procedures for informal resolution of inadvertent tariff errors. In essence, it allows clerical violations of the rules to be corrected without invoking criminal and civil penalties of the Elkins Act.

Again, this change would reduce the likelihood of future negotiated rate crises.

I thank the Subcommittee for this opportunity to provide the views of the shipper community. The League looks forward to working with you and your staff so that an effective and workable solution to the crisis can be found during this congressional session.

I would be happy to answer any questions you may have.

[The statement follows:]

TESTIMONY

ON BEHALF OF

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

Good Morning Chairman Exon and Members of the Subcommittee:

I am Richard N. Bona, Manager of Traffic, Mobil Oil Corporation, Fairfax, Virginia. I appear today on behalf of the National Industrial Transportation League. I am the current Treasurer of the League. Accompanying me as counsel is Richard D. Fortin of Donelan, Cleary, Wood & Maser, P.C.

The National Industrial Transportation League is a voluntary association of shippers, shipper associations, boards of trade, chambers of commerce, and other entities concerned with the purchasing of freight transportation services. The members of the League utilize all of the various modes of transportation and are substantial users of transportation by motor common carrier. The League is the only nationwide organization representing shippers of all sizes and commodities using all modes of transportation to move their goods in intrastate, interstate and international commerce. Directly or indirectly, its members are responsible for the routing of about 80 percent of the nation's commercial freight.

The League played an active role in the process which led to the enactment of the Motor Carrier Act of 1980. In this legislation, Congress substantially reformed motor carrier regulation by fostering a more competitive trucking industry, including placing a new emphasis on market oriented services and prices.

We are here today to seek the subcommittee's support and leadership in resolving a major threat to this environment -- a threat that needlessly could add hundreds of millions of dollars to the national freight bill without producing any benefit for our national transportation system. Specifically, the recent Supreme Court decision in *Maislin v. Primary Steel* requires that Congress this session reaffirm its support for a market disciplined and vital trucking industry. Congress needs to make clear that when it enacted the 1980 Motor Carrier Act, it intended for the old regulatory scheme to give way to a more competitive and innovative one.

The Motor Carrier Act has worked very well over the past decade. Shippers and carriers have worked cooperatively and efficiently in helping to keep American businesses competitive both domestically and abroad. The Department of Transportation estimates that the Motor Carrier Act and the Staggers Rail Act have improved U.S. productivity by about $38 billion a year -- a total benefit of almost $400 billion.

In contrast to the pre-1980 era of uniform rates and service levels, today's shipper and carrier transportation executives constantly are reacting to new market opportunities with innovative rates and services that are responsive to their respective individual needs.

It is in this context of a dynamically competitive trucking industry that the "negotiated rate" problem has arisen. As a result of the 1980 Act, there has been and continues to be a dramatic increase in the number and diversity of rates made available to shippers through negotiations with both existing and new carriers.

Most rates prior to 1980 were uniform, and typically were published in regional rate bureau tariffs. Today, most carriers have an enormous number of rates with varying levels of service that are published in individual carrier tariffs. There has been, in short, a substantial shift from a uniform, tightly regulated motor carrier pricing structure to a regime that allows a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public.

These competitive reforms, while providing new opportunities, also have led to a number of carriers exiting the market. When this occurs, the carrier's freight bills typically are audited by third party collection agencies for the purpose of finding discrepancies between the rates billed and collected and the carrier's tariff rates.

Under the Interstate Commerce Act, it is the carrier's duty to file every rate which it uses to transport goods. Consequently, a carrier's failure to file a tariff or to not fully inform a shipper about any technical obligations attached to the rate leaves the shipper open to after-the-fact claims by these collection agents. While this is not fair, it technically is the law.

In other words, what these audits often have found is that the agreed-upon rate repeatedly assessed by the carrier and fully and timely paid by the shipper was in some cases not filed in a tariff and, therefore, was technically not the applicable published tariff rate. Where this occurs, the collection agency then presents the shipper with "balance due" bills.

Shippers objected to these balance due billings on the grounds that the amounts originally assessed and paid were the terms upon which the shipper and carrier had agreed to conduct, and did in fact conduct, mutually beneficial business. The negotiated rates were considered market rates, not secret "off-tariff" rates. The rates typically could be obtained from a number of competing carriers and shippers believed they would be published in duly filed and effective tariffs by the carrier.

In addition, the collection agents also use other "gimmicks" designed to invalidate rates which were published in a carrier's individual tariffs. By manipulating tariff rules and restrictions, these published rates are alleged to be inapplicable due to a variety of technicalities, including miscellaneous rules or classifications published in separate tariffs.

The problem has grown to the point where conservative estimates set outstanding claims at more than $200 million. Many of these claims involve small businesses and shipments made as long as five years after the fact. The costs of the negotiated rate crisis extend far beyond $200 million. The scarce resources of many thousands of American businesses are being directed to examine a multitude of often poorly documented and highly technical claims by collection agencies that additional money is due and owing. These unnecessary costs ultimately fall on the consumer -- costs that are the direct result of a naked exploitation of certain provisions of the Interstate Commerce Act.

The shipping community sought to stem this burgeoning problem by seeking redress at the Interstate Commerce Commission. A petition for rulemaking first was filed by the League with the Commission in 1985. It ultimately resulted in adoption of the Commission's *Negotiated Rates* policy statement. Under that policy, the Commission has been examining on a case-by-case basis whether auditing firms and others pursuing undercharge claims are engaged in an unreasonable practice in violation of the Interstate Commerce Act.

Specifically, the Commission exercised its statutory authority to bar carriers from engaging in unreasonable practices by examining all circumstances surrounding an undercharge claim. The Commission recognized that Congress intended that the competitive reforms of the Motor Carrier Act substantially would change the motor carrier industry from a tightly regulated to a market oriented one. The Commission also recognized that many shippers had been negotiating with carriers in good faith and had reasonably relied upon carrier representations that the offered rates would be appropriately placed in tariffs.

The Commission rightfully concluded that Congressional intent thoroughly would be undermined if the agency was to allow third parties with no connection to the provision of the transportation services to distort past market decisions and reap exploitative windfalls. To prevent such an undesired and unanticipated outcome, the Commission offered to review complaints by shippers about undercharge claims and to find these claims to be unreasonable if a shipper could demonstrate that it had reasonably and in good faith agreed-to and was charged a particular rate by the carrier.

In the recent Supreme Court decision in *Maislin*, seven of the nine justices concluded that the tariff filing requirements of the Act, as historically interpreted, prohibit the Commission from offering shippers this limited and carefully designed relief. This decision is a tremendous disappointment.

The Justices concluded that the tariff filing and non-discrimination provisions of the Interstate Commerce Act, as they have been interpreted by the Court in the past, prohibited the Commission from finding that it would be an unreasonable practice to collect on an undercharge claim based on the fact that a different rate had been negotiated and assessed.

Unfortunately, the Court's unanticipated refusal to defer to the Commission's attempt to respond to current transportation market conditions entails very costly consequences for the shipping public and consumers. The Court explained that if shippers are to obtain even this carefully measured relief, they must do so based upon legislation enacted by Congress.

It is these events which have brought the League here before you today. The shipping and carrier communities are unanimous in their view that legislative change is necessary if the nation's transportation system is to continue to realize the benefits which have flowed since 1980.

In order to achieve this, the League and others jointly support a three part proposal very similar to H.R. 3243, which is pending in the House of Representatives. In our opinion, such legislation will not place additional regulatory responsibilities upon the Commission. We urge that the Senate promptly introduce and enact such legislation this session.

The first part of our proposal would clarify the right of the Interstate Commerce Commission, under its unreasonable practice authority, to examine the reasonableness of undercharge claims and the right of shippers to obtain damages where appropriate. This part of the proposal would apply to motor common carriers and non-household goods freight forwarders during the time the latter were under ICC regulation. It basically would codify the Commission's existing negotiated rates policy statement and would apply to pending as well as future claims. Under our proposal, the Commission is directed to submit a report to Congress within a year after enactment concerning the current state of the negotiated rates problem and whether there is a continuing need for an unreasonable practice remedy in this area.

The second part reduces the statute of limitations for undercharge and overcharge claims from the existing three year period to a two year period upon date of enactment. The limitations period would be reduced to 18 months one year thereafter. This part also includes a technical change clarifying that shippers retain an existing right to a six month extension if a carrier declines an overcharge claim during the final six months of the applicable limitations period. The League believes that these are appropriate time frames which will allow shippers and carriers more promptly and efficiently to review their records to determine whether correct and appropriate payment has occurred.

The third and final part would allow the Commission to adopt procedures whereby shippers and carriers informally can resolve inadvertent tariff errors. The provision reflects the necessity, in light of the current volume of tariff filings, for shippers and carriers to avoid liability for unintended overcharges and undercharges. It allows paperwork violations to be corrected without invoking the criminal and civil penalties of the Elkins Act. These changes will allow shippers and carriers to reduce substantially the potential for future overcharge and undercharge claims. Such a procedure is consistent with a long held position of the League that motor carriers and shippers should be able readily to obtain ICC permission to waive undercharges or pay reparations where tariff rates or rules, although technically applicable, were unintended or inadvertent.

In conclusion, I would again like to thank the Subcommittee for this opportunity to present the League's views. The negotiated rate problem is currently one of the most pressing in the transportation industry. With all deference to the Supreme Court, we are of the view that its recent decision failed to implement the true intent and policy of this Congress. Enactment of remedial legislation now is critically necessary.

We hope that with your leadership and guidance we can reaffirm the true intent of the Motor Carrier Act of 1980, and assure that shippers, especially small businesses, are not forced to pay hundreds of millions of dollars to third parties who had no role in providing transportation services and who will not be returning those dollars to our national transportation system. We look forward to working with you and your staff on this important issue and enacting legislation during the 101st Congress.

Thank you Mr. Chairman. I would be happy to answer any questions.

* * *

Senator EXON. Mr. Bona, thank you very much. If it is the pleasure of the Committee, we will hear from all the witnesses and then go to questions.

Is that satisfactory, Senator Burns?

Senator BURNS. Yes.

Senator EXON. The next witness, then, will be Mr. George Connolly Jr., President of the Health and Personal Care Distribution Conference.

STATEMENT OF GEORGE J. CONNOLLY, JR., PRESIDENT, HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE

Mr. CONNOLLY. Thank you, Mr. Chairman.

My name is George J. Connolly Jr. I am Director of Distribution for Block Drug Company in Jersey City, New Jersey. And I am here speaking on behalf of the Health and Personal Care Distribution Conference, of which I am President; and also the National Small Shipments Traffic Conference, of which my company is a member.

I am accompanied here by Mr. Daniel Sweeney, who is an attorney for both groups.

There are all but 300 shipper members in these two conferences. We ship primarily in LTL quantities, small shipments, via regulated motor common carriers. Our membership includes many of the major customers of the trucking industry, as well as many smaller companies.

This hearing is to address the most important menace facing our members today: collection agents for bankrupt motor carriers who resurrect freight bills up to five years old and go through the tariffs with a fine-toothed comb to try and find some excuse to raise the rates and create undercharges.

These undercharge claims are presented on an unlimited variety of theories, including rates that were negotiated for a particular shipper's traffic but not filed for whatever reason, but also something that has not been mentioned so far this morning. It also includes rates that were not filed promptly, so as to miss the first several months of shipments, rates that were published in a tariff and charged in the original bills, but then are defeated by some technical rule found in the tariffs. And in these areas there is particular injustice being done against shippers.

The variety of tariff reasons for undercharge claims is limited only by the broad imagination of the individual collection agents and auditors. While the claims all have in common that the collection agent is attempting to renege or go back on the rates that were understood to apply to the shipment and were actually charged in the freight bills, it is important to note that in most instances the agreed rates were actually published in the tariff.

This is not a matter of trying to bail out a few shippers who were making secret rates by not publishing the rates in the tariff.

A few comments on the Supreme Court *Maislin* decision, a giant step backward in my opinion. At a time when the industrial traffic sector of the Nation is swamped with undercharge claims, the Supreme Court has come forward with its *Maislin* decision, overruling decisions from the circuit courts, with just one exception that

have supported the Commission's attempt to protect shippers from being exploited under the guise of the filed rate doctrine.

The *Maislin* decision has created renewed vulnerability for the shipping public to these questionable claims.

We therefore come to the proposed revision of H.R. 3273, for which we are seeking remedy to this injustice. These conferences, together with other shipper groups, and also along with the leading trucking industrial groups, were instrumental in the development of this law. Since the *Maislin* opinion, we have worked again in coordination with these groups to come up with what we think is a revised bill which has the common support of all segments of the industry.

This makes it clear that the Commission may not only find that a failure to file rates to be unreasonable, but that the use of tariff rules, classifications, and other practices to defeat the negotiated rates which were filed, may also be found to be unreasonable practice. The proposed revision would provide that it applies to pending cases, as well as future claims.

And I see that I am out of time, so thank you very much, Mr. Chairman.

Senator EXON. You may go ahead and finish.

Mr. CONNOLLY. Otherwise, unless this bill is enacted to give relief to us, the collection agents will be standing there ready to take $200 million from our shippers. Given the current state of the trucking industry, that bill could rise dramatically in the future. We respectfully ask the Congress to provide relief to us.

Thank you very much.

[The statement follows:]

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON COMMERCE,
SCIENCE AND TRANSPORTATION

Hearing on Negotiated Rates Cases
July 17, 1990

Testimony of George J. Connolly, Jr.

On Behalf of
The Health and Personal Care Distribution Conference
National Small Shipments Traffic Conference

My name is George J. Connolly, Jr., and I am submitting this testimony on behalf of two associations of shippers, The Health and Personal Care Distribution Conference and the National Small Shipments Traffic Conference (NASSTRAC). I am President of The Health and Personal Care Distribution Conference and Director of Distribution of Block Drug Company. Block Drug is also a member of NASSTRAC.

There are over 300 shipper-members of these two Conferences. Their members ship the majority of their freight in small shipment or LTL quantities via regulated motor common carriers. Our memberships include many of the major customers of the trucking industry, as well as smaller companies.

This hearing is to address the most important menace facing our members today: collection agents for bankrupt motor carriers who resurrect freight bills up to five years old and go through the tariffs with a fine tooth comb to try to find some excuse to raise the rates and create undercharges. These undercharge claims are presented on an unlimited variety of

theories, including rates that were negotiated for the particular shipper's traffic but not filed by the carrier for whatever reason; rates that were not filed promptly, so as to miss the first several months of shipments; rates that were published in a tariff and charged in the original bills but allegedly are defeated by some technical rule found in some other tariff; rates that were actually published but included an ambiguous or defective description in the tariff of the commodities shipped; publication of the wrong origin or destination point or failure to include the entire commercial zone of a large city, etc.

The variety of tariff "reasons" for the undercharge claims is limited only by the broad imagination of the individual collection agent/auditor. While the claims all have in common that the collection agent is attempting to renege or go back on the rates which were understood to apply prior to the shipment and were actually charged on the freight bill, it is important to note that in most instances the agreed rates were actually published in the tariff, but the collection agent is claiming some technicality to defeat the collected rates.

This is not a matter of trying to bail out a few shippers making secret rates or under the table deals which they were trying to hide by not publishing the rates in tariffs. This is rather an assault by the collection agents against all shippers, using every tariff gimmick in the book to create asserted undercharge claims and separate shippers from huge

sums of money. It is believed that, by this time, every one of our members has probably been confronted with bills for undercharges. The "filed rate doctrine" is being misused as a wedge to collect high rates which were never intended to apply to these shipments and at which the shippers would never have tendered their traffic, as they had rates comparable to those originally charged which were available via other carriers. It is quite common for the rates claimed to be double the rates originally paid.

The magnitude of currently filed undercharge claims has been estimated at $200 million. If the undercharge campaign is left unchecked, that bill could rise to $1 billion within the next two years.

Significance of the Supreme Court's Maislin Decision

At a time when the industrial sector of the nation is swamped with undercharge claims, the Supreme Court has come forward with its Maislin decision. In the face of decisions from the Circuit Courts (with only one exception) supporting the Commission's attempt to protect shippers from being exploited under the guise of the filed rate doctrine, the Maislin decision has created renewed vulnerability for the shipping public to these questionable claims.

In the face of a dramatically changed rate and tariff world, the Supreme Court opted to overrule the Commission on the basis of old precedents whose validity was appropriate to the era when they were decided. Those decisions were reached

at a time when there were only a limited number of tariffs and shippers generally shipped at uniform rates made in rate bureaus. Today the rates are set by the market, as each shipper negotiates with the carrier for rates reflecting the characteristics of its own traffic. Thus, rather than preventing "discrimination", by refusing to allow the shipper its agreed rates, the Supreme Court has licensed a discrimination against a shipper where the carrier neglected to publish or inartfully published its rates. The beneficiaries of the Maislin decision are not, as assumed by the Court, the other shippers, as they each have their particular negotiated rates, but rather the collection agents who keep most of this money.

The Maislin opinion can, and we believe should, be read as applying only in situations where the rates originally collected were not published. But the practical effect goes far beyond that and could impact every undercharge case filed by the collection agents. The complaints filed by the collection agents cite the filed rate sections of the Interstate Commerce Act and simply allege that the filed rate was not collected. Regardless of whether the real issue in a case is an unpublished/negotiated rate or the more common bases for the undercharge claims, viz., tariff ambiguities, rules in other tariffs which operate to take away the rates, tariff publishing errors, etc., the collection agents argue that the issue is governed by the filed rate doctrine and that Maislin

dictates the shipper must lose the case. Thus, the collection agents are now armed with a precedent which they are using broadly to preclude the shippers from having the cases referred to the Commission for its primary jurisdiction to determine whether there are unreasonable practices, unreasonable tariff rules, tariff ambiguities, and/or unreasonable rates.

Nor is that the limit of the mischief created by Maislin. The collection agents are further arguing that, even if the court should find that there is an issue of tariff interpretation or unreasonableness to be referred to the Commission, the shipper must first pay the rates sought in the court complaint and then go before the Commission for reparations. That, they would argue, is the Congressional intent, even though it would mean that the shipper would have to pay the collection agent real dollars up front and then, if successful before the Commission, be relegated to the status of an unsecured creditor of the bankrupt carrier, with the prospect of ten cents on the dollar.

Proposed Revision of H.R. 3243

These Conferences, together with other shipper groups and the leading trucking industry groups, were instrumental in the development of H.R. 3243. Since the Maislin opinion, we have again worked in coordination with those groups to develop a revised bill which is believed to have common support. The proposed revised bill is attached to my testimony.

H.R. 3243, as originally drafted, was designed to make it clear that the courts should refer the issues raised as to unreasonable practices to the Commission. But the Supreme Court has now seen fit to declare that Congressional intent, which it finds in the filed rate sections of the Interstate Commerce Act, is that the Commission may not find that the carriers failure to file an agreed or negotiated rate is an unreasonable practice. The revised language in the proposed bill makes it clear, not only that such issues should be referred to the Commission, but that the Commission has the power to declare the failure to file agreed or negotiated rates to be an unreasonable practice. And the bill would provide that the Commission may sanction such agreed or negotiated rates as the rates which should prevail. As a safeguard, the revised bill requires that the several circumstances found to constitute an unreasonable practice in Negotiated Rates II are prerequisites to determining an unreasonable practice.

The revised bill also makes it clear that the Commission may not only find a failure to file the "rates" to be an unreasonable practice, but that the use of tariff rules, classifications or other practices to defeat the negotiated rates which were filed may also be found to be an unreasonable practice. Such relief is also necessary because, as mentioned above, there are more cases in this category than of actual failures to file the "rates" themselves.

As did H.R. 3243, this proposed revision of that bill would provide that it applies to pending cases and outstanding claims, as well as future claims. Otherwise, the collection agents would be able to take the outstanding $200 million which they claim from the shippers. Finally, the revised bill would provide for an expiration date for the new statute, subject to reenactment or revision by Congress after a review of the ensuing events. It may be that broader legislation will be required in the future. But, for now, in view of the emergency nature of the situation, it is requested that Congress pass this urgently needed bill immediately. This is particularly apt because the collection agents are redoubling their collection activities since the Maislin opinion.

Senator EXON. Thank you very much.
Our next witness then will be Mr. William J. Augello.

STATEMENT OF WILLIAM J. AUGELLO, EXECUTIVE DIRECTOR/ GENERAL COUNSEL, TRANSPORTATION CLAIMS AND PREVENTION COUNCIL, INC., HUNTINGTON, NY

Mr. AUGELLO. Thank you, Mr. Chairman. I am testifying this morning on behalf of the Transportation Claims and Prevention Council which was formerly known as the Shippers National Freight Claims Council.

The Shippers National Freight Claims Council had formed over 50 joint defense groups for the defense of these obnoxious claims. To answer Senator Burns' question as to how many suits are involved in this issue, I can honestly testify that among our joint defense groups alone we have over 1,000 suits, and this is just one office. We can safely estimate that there are between 3,000 and 5,000 suits presently pending throughout the country and more coming because we have not yet received the undercharge claims from a host of new carriers that have gone bankrupt and whose bills are presently being audited. So the estimate of the $200 million bill as a result of the decision by the Supreme Court I think is very conservative.

Furthermore, if shippers are made to pay these bills, many courts will add prejudgment interest which, dated back to as far as 1983, will practically double the amount due.

In addition, there is a whole new wave of undercharge claims that can be expected as a result of the combination of the *Maislin* decision and the ICC's treatment of contracts. Contracts were entered into between many, many shippers and contract carriers in order to avoid the consequences of the filed rate doctrine. The Commission in its past decisions has been interpreting these contracts

very strictly and applying its contract regulations and the statutory criteria for contracts very strictly, holding that if the contract does not completely meet all of these criteria the parties were not dealing in a contract situation. The Commission has held that the carrier was actually performing services as a common carrier, and, therefore, the common carrier rates must be applied. However, relief was granted under its negotiated rate policy.

Now that the Commission may not find that the collection of the common carrier filed tariff rate would constitute an unreasonable practice, the Commission may not apply that remedy, and shippers will be faced with paying their common carrier tariff rates instead of the negotiated contract rates. We estimate that that will result in billions of dollars of additional undercharges unless Congress reaffirms what it had always intended: to give the ICC the authority to determine when filed tariff rates may be set aside because of the carriers' unreasonable practices or unreasonable rates.

We do not think that Congress intended any one statute to be elevated above another and that section 10701 provides clearly that the Commission may apply that authority.

No public policy is being served by the Maislin decision. Our council, therefore, urges immediate enactment of legislation which will end all of this litigation by opportunistic collection agencies seeking to make windfall profits at the expense of the shipping public. What Maislin did not involve and, therefore, the court did not consider is some of the practices that we have developed in the course of these cases.

For instance, can you imagine a vice president of a major carrier putting rules in the tariffs which act as traps for these shippers and six months before the bankruptcy of the carrier, he leaves the carrier, forms his own audit agency and then succeeds in getting a contract with the bankrupt carrier's trustee to audit all of those bills, knowing full well where all of those undercharges are, because he set them up.

That is documented. It is in our prepared testimony. That is just one example of the inequitable results of this Maislin decision which Congress must consider.

We support H.R. 3243 except for the proposed reduction in the statute of limitations. We would prefer that this proposal not be included and that it be deleted from the bill, but we will not sacrifice enactment of this vital legislation over this provision.

We also seek an amendment to the new provision which has been added to H.R. 3243 saying that the courts may stay the proceedings. We do not think that "may" really reflects what the law is. The word should be changed to "shall", and it should provide, most importantly, that the shippers cannot be required by the court to pay the money into the court while the court refers it to the ICC for determination.

Thank you very much.

[The statement follows:]

TESTIMONY OF

WILLIAM J. AUGELLO, Exec. Dir./General Counsel

TRANSPORTATION CLAIMS & PREVENTION COUNCIL, INC.

Thank you, Mr. Chairman, for the opportunity to present our views on the need for legislation to overturn the Supreme Court's recent decision in Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S.Ct. 884 (1990).

Our Council, formerly the Shippers National Freight Claim Council, Inc., is a not-for-profit trade association dedicated to the prevention of freight loss, damage and delay, the promolgation of reasonable liability rules, laws and claim policies and the equitable resolution of freight claim and freight charge disputes. Its members consist of the transportation professionals in shipper, receiver, carrier, insurer and intermediaries' organizations who are responsible for freight charges and claims, and therefore, have a direct interest in the negotiated, unfiled rate controversy.

THE IMPACT OF MAISLIN

The Supreme Court's decision on June 21, 1990 rejecting the Interstate Commerce Commission's decision in Ex Parte No. MC-177, 3 I.C.C. 99 (1986) and 5 I.C.C. 623 (1989) has had a devastating effect on the entire motor carrier transportation community. Unless quickly overturned by legislation, shippers, receivers, truck brokers and carriers will be forced to pay additional freight charges which have been estimated to aggregate $200 million in pending law suits and undercharge claims. However, these claims are only "the tip-of-the-iceberg", considering the fact that many motor carriers have discontinued operations or filed for bankruptcy within the past two years and their freight bills are currently being audited.

To date, our Council has identified over 130 carriers which have been

filing undercharge claims to collect the difference between the negotiated rates and their tariff rates filed with the I.C.C. A list of such carriers is annexed to this statment as Appendix A.

To help shippers and others defend against these undercharge claims, the Council has organized over 50 Joint Defense Groups representing in excess of 1000 shippers, carriers and brokers being sued for over $13 million. These defendants range from the largest conglomerates to the smallest, unsophisticated enterprises. All are victims of the so-called "filed rate doctrine" which charges shippers and receivers with constructive notice of carriers' rates and rules filed in tariffs with the I.C.C. in Washington, DC.

In the less-regulated transportation environment which followed enactment of the Motor Carrier Act of 1980, however, many motor carriers failed to comply strictly with the I.C.C.'s tariff filing regulations. The obvious reason for carriers' failure to file such reductions in rates was to prevent their competitors from meeting their rates for specific shippers. Shippers relied upon carriers' salesmen's quotations of rates and discounts, and their representations that they were duly filed or would be filed before the traffic moved.

Effective Sept. 14, 1981, the I.C.C. closed the public tariff file, thereby forcing public users to share the official tariff file room with the Commission's staff. In 1985, the I.C.C. discontinued scrutinizing tariff filing. The avalanche of new tariff filings by new carriers and existing carriers, which quickly grew from 17,000 to over 36,000, and the thousands of rates and discounts filed daily at the I.C.C., [1/] dictated a more flexible,

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1/ 40,000 tariff pages were reported to have been filed in the week of May 23-27, 1988, for example. MC-C-30117.

practical system of rate negotiation which placed a greater reliance upon carriers' trustworthiness than under the pre-1980 tariff system. Shippers generally abandoned their tariff files due to the impracticality of maintaining such tariffs on a current basis in this rapidly changing environment.

In many cases, carriers placed numerous restrictions on the rates and discounts negotiated with shippers, and secreted these restrictions in rules tariffs without the shippers' knowledge or consent. Typical of such restrictions was the loss of all discounts and special commodity rates if the freight charges were not paid within a stipulated period. While the parties were doing business, the carriers failed to complain if charges were not received within the stipulated credit period. Only after a carrier discontinued doing business were these credit rules brought to light by collection agencies under contract to trustees.

Some agencies purchased carriers' freight bills, knowing of the widespread disregard for strict observance of tariff regulations and hidden rules. A "cottage industry" of opportunistic collection agencies quickly grew to take advantage of this situation, some of which were formed by former employees of the defunct carrier having inside knowlege of the carrier's violations of tariff-filing regulations.

Examples of the course of conduct prevailing throughout the post-1980 period in which competition between motor carriers and freight forwarders flourished, as intended by Congress, were provided to the Supreme Court in SNFCC's amicus curiae brief filed on June 30, 1989 in Supreme Beef Processors v. Robert Yaquinto, Jr. Trustee for Caravan Refrigerated Cargo, Inc., No. 88-1958. Annexed as **Appendix B** is a copy of the Digest of Unreasonable Practices reported to the Supreme Court as Appendix A to that brief. They include examples of the deliberate frauds committed on shippers through the use of counterfeit tariffs; the establishment of audit agencies by former carrier

officials who promulgated the tariff restrictions which resulted in the technical undercharges; the conscious decisions by carriers' upper management to refrain from publishing the negotiated rates; claiming that transportation was performed by a company under its common carrier certificate rather than its contract permit or broker's license; publishing credit rules without the shipper's knowledge which invalidated discounts and subjected the shipper to interest and attorney fees for collections, etc.

The following additional examples of the circumstances under which undercharges are being sought illustrate the glaring inequities resulting from a strict application of the filed rate doctrine in the post-1980 period:

1) Where a carrier's tariff placed a 45,000 lb. maximum weight on a quoted rate without the shipper's knowlege, and shipments exceeded the maximum by a few pounds, the collection agencies are contending that the tariff rate does not apply, and instead, the carrier's class rates must be charged. Thus, the carrier's failure to provide for an excess weight rule results in an increase in the quoted published charge of $550 per truckload to $1,862, a 238% increase. (See Appendix C).

2) An office furniture manufacturer submitted bids to provide furniture to every Post Office in the U.S. and certain Air Force facilities at a delivered price based on a written rate quotation received from a carrier. The contract was awarded and performed, but the manufacturer is being sued for an additional $50,000 in freight charges based on higher filed rates due to the fact that the carrier interlined this traffic with other carriers for its own convenience. The carrier, McLean Trucking Co., apparently published the agreed rates to apply only when the traffic was handled on a single-line basis.

The Supreme Court ignored similar evidence of violations of the law, in Maislin, opting to adhere to its 80 year-old doctrine intended to prohibit

discrimination among shippers.

THE I.C.C. POLICY STATEMENT

Faced with voluminous evidence of industry-wide tariff violations, misrepresentations, and in some cases fraudulent practices by motor carriers and freight forwarders following enactment of the Motor Carrier Act of 1980, the I.C.C. concluded that its previously strict interpretation of the filed rate doctrine should be relaxed in the public interest. The Commission concluded that in the more competitive transportation environment mandated by Congress, the marketplace was a sufficient deterrent to discrimination and that it had discretionary powers under 49 U.S.C. §10701(a) to grant relief to the victims of these unlawful practices.

Acting in response to shipper organizations' petitions, the I.C.C. declared that it would constitute an unreasonable practice to collect more than the negotiated rate under certain conditions. This new policy was upheld by 20 Circuit Court Judges in 13 independent cases in six circuits. (See **Appendix D**). Only the Fifth Circuit ruled differently. In addition, over 100 U.S. District Courts and Bankruptcy Courts upheld the I.C.C.'s primary jurisdiction to adjudicate this issue.

Nevertheless, the Supreme Court reversed the Eighth Circuit's decision in Maislin on the ground that the I.C.C. lacked authority to find that it would be an unreasonable practice to do what the statute required. The Court concluded that the Commission may find the filed rate to be unreasonable, and remanded the case to the Eighth Circuit for exploration of this issue. (Footnote 10, Maislin).

LEGISLATIVE RELIEF NEEDED

No public purpose is being served by the Supreme Court's decision in Maislin. Payment of judgements against shippers, brokers and carriers to defunct carriers' trustees will not benefit the motor carrier industry. Nor

will payment produce any significant benefit to creditors as the collection agencies, auditors and their attorneys retain approximately 80% of the amounts recovered as commissions, fees and expenses. See, for instance In re: Rose Freight Lines, Inc., Bkcy. 4-87-2990, Aug. 10, 1989, U.S. Bkcy. Ct., D.Minn., wherein the court refused to approve an audit contract under which the creditors would receive only 20% of the recoveries, and expressing the opinion that this practice does not reflect well on the bankruptcy system.

If Congress fails to intervene in this controversy before it adjourns, much of the benefits resulting from the 1980 Motor Carrier Act will be dissipated. Congress must not permit the Supreme Court's myoptic view of the Motor Carrier Act of 1980 to prevail.

The Supreme Court clearly laid the solution to this unanticipated problem in Congress' hands, stating

> "If strict adherence to §§10761 and 10762 as embodied in the filed rate doctrine has become an anachronism in the wake of the Motor Carrier Act, it is the responsibility of Congress to modify or eliminate these sections." Pg.18, Maislin.

Justice Scalia, in a concurring opinion, added

> "Perhaps deregulation cannot efficiently be accomplished within that framework, but that is Congress' choice and not the Commission's or ours."

In our Council's opinion, the Supreme Court improperly considered the filed rate doctrine in light of the statutory scheme designed to regulate the railroads in the 1890's and motor carriers and freight forwarders in the pre-1980 era. The Court misread Congress' intent in 1980 to leave to its designated body of experts discretionary powers to make any adjustments in its regulations and enforcement policies necessary to give effect to the new regulatory scheme for motor carriers and freight forwarders in the 1980's. Congress need not have changed §§10761 or 10762 in 1980, as repeatedly stated by the Court. Nor was it necessary to amend or repeal §10741 which prohibits

discrimination. We sincerely believe that Congress left to the I.C.C. the details of how to harmonize these statutes with the newly mandated competitive environment. Congress left the Commission's "reasonableness powers" under §10701(a) in tact in 1980, and the I.C.C. dutifully relied upon these powers to find that the course of conduct which flowed from the statutory and regulatory changes made in the 1980's constituted an unreasonable practice which rendered the filed rates unlawful.

Congress must now overturn the Supreme Court's decision and reaffirm its intent to delegate these powers to the I.C.C. In so doing, the following issues must be addressed in the legislation if it is to survive judicial review and provide shippers with effective relief:

1. The remedial legislation must be made applicable to all pending and future claims and suits, and must be enacted before adjournment of this session of Congress. The need for an immediate remedy cannot be overemphasized. Primary Steel's plight is illustrative of the plight of thousands of other defendants in similar pending cases. Motions for summary judgments are pending and will be granted in many cases forthwith. In Primary Steel's case, for example, it may be forced to pay $187,923.36 plus prejudgment interest from 1983 totalling approximately $100,000, or a total of $288,000 to Maislin's trustee very shortly unless Congress comes to its aid.

2. The remedial legislation must specifically provide that when additional freight charges are alleged to be due, a shipper/defendant need not pay the claimed tariff rate and then seek relief through a petition to the I.C.C., as held by the Fifth Circuit in Caravan v. Supreme Beef Processors, Inc., 864 F.2d 388, 391-392 (5th Cir.1989), cert.den. 110 S.Ct. ___ (1990), citing its decision in Southern Pacific Transp. v. City of San Antonio, 748 F.2d 266 (1984). This provision is essential to protect shippers against being

forced to pay claimed undercharges sought by the carriers' trustees pending the I.C.C.'s determination of their lawfulness. Plaintiffs' counsel are currently making such demands in pending law suits. If shippers are required to make such payments to Trustees, they will be devoured by collection agencies', Trustees' and attorneys' commissions, fees and expenses and thus will be unavailable to make reparations to shippers even if the I.C.C. rules that the filed rates were unreasonable or otherwise unlawful.

A simple statement adding the following provision at the end of Section (1) of HR 3243 could remedy this problem. For instance,

> "In such proceedings, the payment of the filed tariff charges shall not be required pending referral to the I.C.C."

3. The Commission's authority to find a filed tariff rate to be unlawful by reason of a carrier's unreasonable practices must be affirmed. In this connection, Congress must reaffirm its intention that §§§10741, 10761 and 10762 be implemented by the I.C.C. in harmony with §10701(a), and that no statute be elevated above another.

4. Congress' intent in 1980 to rely on increased competition among motor carriers and freight forwarders as a regulator of discrimination, in lieu of a strict interpretation of the filed rate doctrine, must be reaffirmed. The elimination of the prohibition against dual operations as a common and contract carrier, thus removing the "per se discriminatory" label from dual operations, is clear evidence of such intent. See Pub.L.96-296 §10(b)(1) amending 49 U.S.C. §10930(a)(1). See Also §10923(d)(1) and (2) permitting grants of industry-wide permits to broad geographic areas and to serve broad classes of persons, such as "all shippers and brokers of general commodities". Unless this intent is reaffirmed by Congress, many other Commission policy changes made after 1980 will be subjected to judicial review as a result of the Supreme Court's decision. See Footnote 14 in Maislin, for instance.

The following amendment would appear to accomplish this result:

"Amend 49 U.S.C. 10701 by adding another subsection, as follows:

Notwithstanding any other provision of this subtitle, in considering the reasonableness of motor carrier and freight forwarder rates, classification, rules and practices on property moved pursuant to the Motor Carrier Act of 1980, the Commission has discretion to harmonize the provisions of this section with sections 10741, 10761 and 10762, and to consider changes in competition and other conditioins in the transportation industry resulting from changes enacted by the Motor Carrier Act of 1980, P.L. 96-295, July 1, 1980."

IMPACT ON THE FEDERAL BUDGET DEFICIT

Shippers and consumers will not be the only losers under Maislin if remedial legislation is not enacted quickly. Thousands of cases will need to be referred to the I.C.C. to determine the reasonableness of the filed tariff rates claimed to apply in pending and future undercharge cases.

At the present time, the I.C.C.'s staff consists of only three Administrative Law Judges who each handle approximately 50 cases a year. The additional appropriations needed to accommodate approximately three to five thousand rate reasonableness cases would be staggering. At a time when the Congress is struggling with the national deficit, Congress needs to adopt measures which will avoid such unnecessary spending of taxpayers' money. Enactment of remedial legislation to overturn Maislin will thus be in the public interest.

MAISLIN'S IMPACT ON CONTRACTS

The Supreme Court's decision, when combined with recent I.C.C. decisions invalidating contracts between shippers and brokers, on the one hand, and contract carriers on the other, has potential for causing significantly greater financial injury to the shipping community. In the course of considering negotiated rate cases, the I.C.C. has declared that contracts which fail to strictly comply with its regulations are invalid, and therefore, the

carriers provided service under their common carrier certificate rather than their contract permits. The Commission granted relief from these carriers' filed common carrier rates, however, by considering the negotiated contract rate to be the lawfully applicable rate pursuant to its negotiated rate policy. The Supreme Court's reversal of that policy therefore places thousands of shippers in jeopardy of having their contracts set aside, thus requiring payment of carriers' common carrier tariff rates. These claims could readily cost shippers billions of dollars.

The Council has recently filed a petition with the I.C.C. requesting immediate repeal of its contract carrier regulations and a reversal of decisions which invalidated contracts for failure to adhere to statutory and regulatory criteria. If Congress fails to overturn Maislin, and the I.C.C. fails to rectify its policy on contracts, the consequences will be far more serious than the amounts sought in pending cases due to the prevalence of contracting to avoid the filed rate doctrine.

HR 3243

This Council will support any legislative approach which will directly overturn Maislin in a manner which will protect shippers from payment of all pending and future claims based on carriers' negligent or intentional failure to properly publish and file the agreed rates and discounts.

The Council cannot, however, support any attempt to deprive shippers and receivers of any other statutory rights such as a reduction in the statute of limitations for filing overcharge claims, as a quid pro quo for enactment of legislation which merely reaffirms past Congressional intent.

The Committee's early mark-up of appropriate legislation is respectfully requested.

Senator EXON. Thank you, Mr. Augello.

Let me say at this time we appreciate the excellent statements and the brevity of the statements in the interest of conserving time. Without objection, the full statements by each one of the members of the panel will be incorporated into the record.

Before I recognize the next witness, I just want to put in a little ad lib comment, and this is not intended to discredit the excellent representations that are assisting the panel of the two counsel that have been introduced or the distinguished member of our committee, Senator Pressler from South Dakota.

There are those of us who are not lawyers who feel that we could make a giant leap in the right direction if we could just get one nonlawyer appointed to the United States Supreme Court. If we could accomplish that, we might be able to take a step in the right direction. I will not put that to a vote at the present time, because if I did I know how Senator Burns and I would vote, and I suspect I know how Senator Pressler would vote.

Senator PRESSLER. I would vote for it.

Senator EXON. Notwithstanding that, we will not put that to a vote right now. Thank you very much.

The next witness then will be Mr. Steven Fernlund, the Chairman of the Legislative Committee of Transportation Brokers Conference of America.

Mr. Fernlund.

STATEMENT OF STEVEN D. FERNLUND, CHAIRMAN, LEGISLATIVE COMMITTEE, TRANSPORTATION BROKERS CONFERENCE OF AMERICA, ST. PAUL, MN

Mr. FERNLUND. Thank you, Mr. Chairman. I will dispense with any of my ad libs about attorneys, not being an attorney myself, and, being involved in this issue for some time, I have gotten to know many attorneys.

My name again is Steve Fernlund. I am President of a transportation brokerage firm named Twin Modal headquartered in Minneapolis, Minnesota. We are an employee-owned firm, and we serve customers from offices in seven states across the country. Right now, my company is facing several undercharge claims that total almost a $.25 million in various stages of litigation.

Today I am here representing the Transportation Brokers Conference of America. Our 1,400 members are ICC licensed property brokers who provide a variety of services to shippers and carriers, primarily smaller shippers and carriers. We are here today to address the Maislin issue. I think it is important to consider how this all has come about.

There are regulations still on the books that became the filed rate doctrine. These regulations are fundamentally incompatible with the marketplace that has existed in transportation since the early 1980s. This incompatibility allows unproductive and undeserving entities, rate auditors and their attorneys to profit from carrier negligence. These profits are taken from innocent brokers and shippers. The crime, if there has been one, that has been committed has been perpetrated by motor carriers who have failed to

properly file their rates at the ICC. With this Maislin decision, what is going on today may be legal but it is not fair.

Following the Maislin decision, we also find that the filed rate doctrine is not just for bankrupt carriers anymore. If the filed rate is to be enforced, all common carriers must now audit the past three years worth of freight bills and present balance due claims to their customers for filed tariff rates.

In our opinion, the $200 million figure that we hear bandied about for this problem is just the tip of the iceberg. If legislation is not enacted immediately, I would guess that within one year from now we will be facing claims in excess of $1 billion.

Echoing Mr. Augello's comments, brokers and shippers are mistaken today if they believe that written contracts with carriers who hold both contract and common carriage authority from the Interstate Commerce Commission will protect them from undercharge claims. Virtually all of the claims against my company, all $236,000 worth, stem from just such a situation. These auditors and their attorneys basing their allegations on technical discrepancies in our written contracts, are making claims for rates that are filed in the carriers' common carrier tariffs. They are trying to void the contractual arrangement between my company and the contract motor carriers who serve our clients.

In our opinion, the filed rate doctrine is simply bad policy. It adds to the carriers' cost of doing business and has not been demonstrated to serve any purpose in the public interest. We believe it is incompatible with Congressional intent to deregulate transportation.

No less an authority than the regular Common Carrier Conference of the American Trucking Association has pointed out some of the flaws in the filed tariff doctrine. I quote from their recent petition before the ICC, which said, "Today the Commission's tariff files are replete with tariffs which reveal no meaningful rate information at all. Neither the rates charged nor the traffic to which rates apply is discernible from these filings."

The Transportation Brokers Conference of America agrees with this statement, and we submit it as evidence that the filed rate doctrine is not necessary. The Supreme Court in the *Maislin* decision has pointed out the incompatibility between the filed rate doctrine and today's marketplace. Everyone now agrees that Congress must make a decision and make it now to reconcile this incompatibility.

The TBCA strongly urges Congress to reverse the court's decision by writing new laws more compatible with the realities of our marketplace today, to acknowledge the legitimacy and lawfulness of negotiated rates and to relieve brokers from the strict obligation to pay filed tariff rates.

Moreover, we recommend that Congress grant the Interstate Commerce Commission the authority to afford such relief. We also hope that during the course of these hearings the filed rate doctrine will be exposed as the ugly menace that it really is in transportation today and that at some time in the future Congress will consider repealing those sections of the act.

Thank you, Mr. Chairman.

[The statement follows:]

Statement of

STEVEN D. FERNLUND
President, Twin Modal, Inc.

Representing the

TRANSPORTATION BROKERS CONFERENCE OF AMERICA

My name is Steven D. Fernlund. I am President of Twin Modal, Inc., and a licensed transportation broker in St. Paul, Minnesota. I am also a member of the Transportation Brokers Conference of America and for the past two years have served as Chairman of the Association's Legislative Committee.

Twin Modal, Inc. was founded in 1975 as a two man operation brokering freight from points in Minnesota to points throughout the United States. Today Twin Modal employs sixty people at offices in Minnesota, Nebraska, South Dakota, Illinois, Michigan, New Jersey and Georgia. We are now an employee-owned, full-service brokerage company that has enjoyed annual growth rates in excess of 20 percent since 1975. The bright future this portends is now clouded by eight separate undercharge claims totalling $236,000--six from bankrupt carriers and two from carriers who sold their assets and are attempting to recover additional monies for stockholders.

THE TRANSPORTATION BROKERS CONFERENCE OF AMERICA

The Transportation Brokers Conference of America represents 1400 licensed transportation property brokers throughout the United States. Brokers serve shippers and carriers in much the same way that travel agents serve passengers traveling for business or pleasure. Brokers provide a wide variety of services related to motor truck, rail, and air transport. Brokers supply valuable information to shippers and carriers on price and

service availability, arrange for the pickup and delivery of freight, and participate in scheduling, collection, billing, damage evaluation, and warehousing.

Before 1980, the regulatory climate severely restricted the services offered by transportation brokers. Before 1980, fewer than 100 transportation brokers participated in interstate commerce. Today there are over 6,000.

For the past decade the brokerage industry flourished because the Motor Carrier Act of 1980 freed transportation from a half-century of burdensome regulation. But the future of brokerage looks bleak as undercharge claims systematically drive brokers into bankruptcy. While brokers stand helpless, unscrupulous collection agencies engage in legalized theft by ferreting out technicalities in an antiquated law known as the filed-rate doctrine.

THE FILED-RATE TIME BOMB

The typical undercharge scenario begins when a broker and a common carrier negotiate to move freight at a rate discounted from the carrier's filed rate. They come to terms and the carrier promises to file the negotiated rate with the Interstate Commerce Commission. Since it is not practical for the broker to wait several days (or weeks) for the Interstate Commerce Commission to verify that the carrier filed the negotiated rate, the freight moves, the broker pays the carrier and everyone is happy.

The law requires carriers to file their rates with the Interstate Commerce Commission. Carriers who willfully fail to file their rates may be imprisoned for two years and fined up to $20,000. Nonetheless, carriers routinely fail to file negotiated rates.

The scenario turns nasty when carriers go bankrupt and collection agencies begin poring over the bankrupt carriers' books. All too frequently the collection agencies are able to unearth hundreds of negotiated but unfiled rates. The filed-rate time bomb hits when the collection agencies gleefully present brokers with undercharge claims for the difference between the negotiated rates and the rates on file at the Interstate Commerce Commission.

Adding insult to injury, the recent Supreme Court's decision in Maislin v Primary Steel asserts that the law requires carriers to collect the undercharge even when the carriers willfully fail to file the negotiated rates. Brokers can't help but feel that the law is, in addition to being unfair, sanctioning negligence.

Strict adherence to the filed-rate doctrine would allow collection agencies to pirate over $200 million from brokers and shippers according to conservative estimates. This unjust, albeit legal, transfer becomes all the more absurd when we recognize that the only crime committed was the failure of the carrier to file the negotiated rates. Brokers committed no crime; they negotiated rates that were <u>voluntarily</u> agreed to by carriers. But for the carrier's crime the broker must pay the

carrier the non-negotiated filed rate. This may be legal, but it's not fair.

UNDERCHARGES ARE NOT LIMITED TO BANKRUPT CARRIERS

Before the Supreme Court decision, the undercharge issue was limited to claims from bankrupt carriers. That is no longer the case: now nothing prevents a profitable carrier from billing undercharges. Although this is especially true if the business relationship between broker and carrier has terminated, brokers can also expect undercharges from carriers they are currently doing business with. Many carriers are confident that they can readily replace one broker with another; carriers looking for a source of quick cash are highly likely to stick their current brokers with undercharges and then find new brokers.

The Supreme Court's decision creates an incentive for profitable carriers to commit fraud. The following scenario is highly plausible: (1) a carrier solicits freight from a broker by offering a 50 percent discount from the filed rate, (2) the carrier deliberately and willfully fails to file the discounted rate at the Interstate Commerce Commission, (3) the carrier presents the broker with an undercharge claim for the full filed rate, (4) the carrier finds another broker to take advantage of.

Even more ominous is the potential for undercharges on freight moved under contract. The Transportation Brokers Conference of America encourages its members to do business with contract carriers rather than common carriers. A contract

carrier transports property under exclusive agreements and the Interstate Commerce Commission exempts all motor contract carriers from the tariff-filing requirements. Since contract carriers are exempt from tariff regulations, the lawful rate is the rate specified in the contract. For years brokers signed written agreements with contract carriers to protect themselves from undercharge claims, and for years brokers slept peacefully. Today, these brokers are having nightmares. The Supreme Court's decision calls into question these contracts. Transportation attorneys are pointing out that contract rates can be ruled illegal if they do not make specific reference to the special needs being met and the special equipment being used. If the contracts are declared invalid, trucking companies holding both common and contract carrier authority will be able to collect undercharges (the difference between the contract rate and the rate on file under the company's common carrier authority).

The willingness of carriers to challenge the lawfulness of their own contracts is not merely something that may happen in the future--it's happening right now. Many carriers are taking a close look at their contracts hoping to find a technical flaw so that they can declare their contracts invalid and bill undercharges to brokers.

In virtually all of the claims filed against Twin Modal the carriers provided proof of liability and cargo insurance, copies of their contract carrier permits, and written contracts. But the attorneys for the auditors are alleging that the contracts

are invalid and, therefore, subject to the much higher common carrier rates.

In one case involving Overland Express, I have a written contract and correspondence between Overland's Vice President of Marketing and myself acknowledging execution of the contract and providing names of individuals for our staff to use to obtain rates and service. When auditors for Overland challenged the contract, I petitioned the Interstate Commerce Commission. In response to my petition, Noreta R. McGee, Secretary of the Interstate Commerce Commission stated: "The contract between Rose and Twin is nothing more than a simple agreement to do business, setting forth various rights and responsibilities of each party. If it meets State law criteria, it is a valid contract." But the attorneys for the auditors allege that the transportation provided under these valid contracts is common, not contract carriage. The claims persist and legal fees mount.

COMPETITIVE MARKETS OR ANTIQUATED REGULATIONS?

The Supreme Court's decision in Maislin *v* Primary Steel reveals the fundamental incompatibility between the filed-rate doctrine and the realities of today's marketplace. The two cannot coexist and members of this committee must make a choice: will you maintain antiquated regulations, or will you support free and competitive markets?

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Passage of the Motor Carrier Act of 1980 signaled a new era in transportation and ended a half-century of protectionism. The Congress replaced an old, inefficient regime of bureaucratic regulation with a new market-oriented system characterized by price flexibility and free entry. The benefits of the new system have exceeded the expectations of even the most optimistic free-market advocates. The new competitive environment spawned innovation, reduced transportation costs, and saved consumers billions of dollars.

The benefits of the new system are now being threatened. The threat does not come from the Japanese or the Europeans. The threat comes from strict adherence to the filed-rate doctrine.

Nearly 100 years ago Congress required carriers to file rates to prevent discounting. In that bygone era, Congress was convinced that stability and equality of rates was more important to commercial interests than reduced rates. For years the Interstate Commerce Commission defended strict adherence to the filed-rate doctrine by arguing that it was "vital in our commercial life that there shall be one fixed and absolutely rigid rate governing the transportation at a given time of any given commodity between two given points."

Although brokers are amused by the well-intended but fallacious ideas of a bygone era, we are gratified that a variety of practices that previously would have been unlawful are now lawful. For example, under the old regime it was unlawful for a carrier to offer a discount to a shipper. Under the new

competitive system brokers, shippers and carriers recognize that discounts are economically justified by cost differences. More important, offering a discount gives new carriers an opportunity to gain a foothold in the marketplace.

Transportation brokers are astonished by the Supreme Court's resurrection of the filed-rate doctrine. Congress made a fundamental policy choice in favor of deregulation when it passed the Motor Carrier Act in 1980. Overnight, the filed-rate doctrine became an anachronism. The Motor Carrier Act directs the Interstate Commerce Commission to promote competitive and efficient transportation services in order to meet the needs of shippers, receivers, passengers, and consumers, and allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public. In addition, the Motor Carrier Act directs the Interstate Commerce Commission to encourage the establishment of reasonable transportation rates without unfair or destructive competitive practices. Strict adherence to the filed-rate doctrine is incompatible with these directives.

The filed-rate doctrine is a bad law, and bad laws are the worst sort of injustice. Brokers can only hope that President Ulysses S. Grant was right when he stated, "I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution."

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Nearly 100 years ago, Congress enacted the filed-rate doctrine to protect brokers, shippers and the consuming public. Today the filed-rate doctrine is being used by carriers and collection agencies to victimize brokers, shippers and the consuming public. Strict adherence to the filed-rate doctrine undermines the purpose of deregulation and produces absurd results. The only purpose served by strict adherence to the filed-rate doctrine is to provide windfalls for unscrupulous carriers and collection agencies.

The members of this distinguished Committee are mistaken if they imagine there is anything simple in tracking down or filing a negotiated rate with the Interstate Commerce Commission. The mechanics of the tariff-filing system are extremely complex and subject to a multitude of technical errors.

CONGRESS CAN UNDO THE DAMAGE

The Court's majority recognized the need for congressional intervention to reconcile the conflict between the law and deregulation. Justice William J. Brennan wrote: "If strict adherence to Sections 10761 and 10762 (the tariff-filing requirements) as embodied in the filed-rate doctrine has become an anachronism in the wake of the Motor Carrier Act, it is the responsibility of Congress to modify or eliminate these sections." In a concurring opinion, Justice Antonin Scalia pointed out that the Motor Carrier Act plainly reflects an intent to deregulate. Justice Scalia then wrote: "perhaps deregulation

cannot efficiently be accomplished within that framework, but that is Congress' choice and not the Commission's or ours."

We strongly urge Congress to reverse the Court's decision by writing new laws more compatible with the realities of the marketplace, to acknowledge the legitimacy and lawfulness of negotiated rates, and to relieve brokers from the strict obligation to pay filed rates. Moreover, we recommend that Congress grant the Interstate Commerce Commission the authority to afford such relief.

Specifically, the Transportation Brokers Conference of America urges Congress to pass legislation reversing the Maislin decision. We recommend the following statutory language:

> *Where tariff rates or charges are sought to be collected in addition to those originally billed and collected by a motor common carrier, the Commission may find the collection of such additional tariff rates and charges to be an unreasonable practice in violation of Section 10701 and that no additional tariff rates and charges can be collected. In instances where a civil suit is brought to collect rates or charges in addition to those originally billed and collected, such issues shall be referred to and be determined by the Commission under its primary jurisdiction and relief may be obtained under Section 11705(b)(3) of this subtitle.*

Senator EXON. Thank you very much, Mr. Fernlund. The last witness on this panel is Mr. Robert E. Davis, President of the National Association of Freight Transportation Consultants. Mr. Davis?

STATEMENT OF ROBERT E. DAVIS, PRESIDENT, NATIONAL ASSOCIATION OF FREIGHT TRANSPORTATION CONSULTANTS

Mr. DAVIS. Thank you, Mr. Chairman, members of the Committee and distinguished guests.

My name is Robert E. Davis. I am president of Transportation Cost Control, a firm of transportation consultants in Clackamas, Oregon, and I am also President of the National Association of Freight Transportation Consultants.

I will stress "consultant" as opposed to auditing. Auditing freight bills is one of the functions that I do, but certainly not for bankrupt carriers. I audit freight bills for clients.

Chairman Philbin earlier had mentioned that he was not aware, I think, specifically of wilfulness of carriers failing to publish tariffs. Mr. Augello pointed out a documented case where carriers apparently very wilfully failed to file and publish tariffs. I know some of our member consultants have very well documented and have former employees of carriers who have very wilfully failed to publish and file their tariffs. We only assume that it was for the express purpose of turning around and then coming back to those shippers to collect these undercharges.

Some of the other problems that I also see that were mentioned: trigger tariffs that are activated by sign-up letters. You write a letter to participate in the tariff. There is nothing in the tariff, however, that says who does or does not participate in it. Auditing companies, collection agencies, lose conveniently the sign-up letters. Nobody knows who secret account code number, 12345 is. Tariffs are restricted to only apply for that particular shipper number. Many of the freight bills, balance due bills, are based on very wild tariff interpretations, and if you are sued on it, well, you are sued on it, no matter how wild they are.

We can of course go to the ICC offices and attempt to find tariffs. I do not know if any of you gentlemen have been to the Commission office lately, specifically the tariff room. It is ""not what it used to be." It is very difficult to find documents in that office.

One of the problems that our association and that I have with the new legislation, about the only thing, is the reduction in the statute of limitations. The primary shipper groups supporting this legislation have been NIT League, NASSTRAC, I think two organizations that comprise about 1,000, maybe a total of 1,200, members.

Yesterday morning before I left Portland I received a new little brochure, Manufacturers' News Incorporated, which is a state-by-state breakdown of the manufacturers in the United States. There are 409,000 manufacturers listed in these guides. Mr. Chairman, in your State there are 1,699 manufacturers listed. But approximately 1,200 of the largest shippers in the country have elected to decide for everyone, these 400,000 and other businesses, to support the shortened statute. Many of our clients do not feel that a shortened statute is necessary to gather support from their larger brethren,

the larger shippers in the country, and from our still-viable regular common carriers.

We do not support the elimination of a filed-tariff doctrine. If the Committee would desire we will certainly be happy to present some testimony as far as filed tariffs. While many of us here have faulted the Supreme Court for their decision, I think that the Court made some very excellent points They pointed out the penalties that are provided for a violation of the Interstate Commerce Act with the implication that they should be applied, and I would urge the Commission to go to the Department of Justice in those cases where they can see wilfull violations.

The ICC has permitted or created a situation where rate discrimination has or can occur, and of course I believe the court certainly was talking about the Commission we had a year ago, as opposed to what we have today. The Court also very much pointed out that protection against rate discrimination continues to be of paramount importance. One of the ways to accomplish that is with the filed tariff. The court was very blunt in noting the market power that large shippers have.

The last thing I would say is, I would appreciate this Congress, this Committee, enabling the ICC to put some teeth back into what they can do.

Thank you very much.

[The statement follows:]

STATEMENT OF THE

NATIONAL ASSOCIATION OF FREIGHT TRANSPORTATION CONSULTANTS (NAFTC)

The National Association of Freight Transportation Consultants (NAFTC), is as its name states, a professional association of companies and individuals engaged in the provision of freight transportation consulting services to shippers, carriers and others. NAFTC has submitted earlier statements to Congress concerning HR 3243, the first proposed legislation designed to treat the bankrupt motor carrier freight due bill crisis the industry is experiencing.

While NAFTC has never opposed legislative relief for this problem it has vigorously opposed the inclusion of a provision in the legislation that would reduce the statute of limitations applicable to freight overcharge and undercharge bills. Our opposition to that concept was and is based on the following:

(1) The ICC's Negotiated Rates Policy, which this bill would codify, deals with a particular problem -- freight balance due bills emanating from bankrupt motor carriers. Changing the statute of limitations will neither improve nor detract from that policy.

(2) The statute change was part of a deal negotiated with motor common carriers by one shipper group (NASSTRAC) pursuing an agenda beneficial to its members, that was subsequently joined by others (NITL et al), in return for carrier support of this proposed legislation. That is its sole function -- to garner carrier support for this legislation. NAFTC has been advised by several of the involved parties that if there was not united support the bill would fail passage in Congress.

Compromise is a fact of life and NAFTC has no objection to it if the end result will be an improved atmosphere in which both shippers and carriers can function efficiently. However, NAFTC subscribes to "win-win" negotiation -- a situation that results when <u>all</u> parties involved are treated equitably.

Not all shippers, as has been illustrated by the surveys NAFTC members have taken of their shipper clients (the results of which have been transmitted to Congress), favor a reduction in the statute of limitations applicable to over and undercharge claims. Many medium and small sized shippers have little if any exposure to bankrupt carrier freight due bills as they were unable to negotiate the large discounts (up to 70% off of tariff rates) bestowed on their larger, oftentimes competing, shipper brethern. As a result these shippers overcharge claims far outweigh any balance due bills they have received or might receive in the future from bankrupt carriers.

NAFTC feels these objections to a reduction in the statute applicable to over and undercharge claims remain valid.

NAFTC is also of the opinion that the ICC, primarily under Chairman Gradison's leadership, bears the lion's share for creating the situation that exists today and that generated this court decision. The failure of the Commission to enforce tariff filing requirements is the primary culprit. Congress is to be complimented on its recent appointment confirmations as they have gone a long way to restoring the ICC to the independent regulatory agency it is supposed to be.

However, that does not mean the Negotiated Rates Policy formulated by the Commission is in error. NAFTC agrees with the dissenting justices in the U.S. Supreme Court's decision in Maislin vs. Primary Steel. The decision's interpretation of the filed rate doctrine is unnecessarily harsh. It does apply an even stricter interpretation to the filed rate doctrine than in the past. NAFTC believes:

(1) the ICC can legitimately review all the circumstances surrounding a negotiated rate that has been subjected to a balance due bill;

(2) that unreasonable practices are a proper basis upon which to find such balance due bills uncollectable because they can make the rate unreasonable;

(3) that the filed rate doctrine is not set aside by such a policy;

(4) that, the filed rate doctrine can actually be strengthened by the Negotiated Rates Policy because a carrier (or its agents) would not be allowed to benefit as a result of negligent or outright fraudulent behavior in performance of statutory duties;

(5) that a shipper should not be forced to seek a court referral to obtain relief from these types of carrier practices, it should be able to petition the ICC directly;

(6) that there are sufficient penalties contained in the IC Act to punish carriers and their officers who fail to file rates, and, shippers and carriers who would collude for any reason in negotiating truly secret rates, and, that the ICC should and must enforce those penalties;

(7) that carriers and shippers, should be given some relief from Elkins Act and other penalty provisions (as proposed in this legislation) to cover legitimate oversights resulting from untimely tariff publishing (subject to ICC review).

It is a fact that reduction of the statute is not necessary to codification of the ICC's Negotiated Rates Policy. It is also a fact, that legalization of the ICC's Negotiated Rates Policy is neither beneficial nor detrimental to motor common carriers. The statute reduction provision in this legislation is only there because it is what the carriers want in exchange for their support. United support is apparently not possible without this concession to motor carriers even though they have been offered reasonable alternatives -- such as reducing the statute to 24 months -- which they rejected.

NAFTC's members are professional consultants who are able to look at both the shipper and carrier side of this issue. We believe what the carriers want asks too much and will work hardships and exact unfair penalties from smaller and medium sized shippers who have very limited exposure to balance due bills, because they have not been the beneficiaries of large discounts. Our members report many of their shipper clients repeatedly ask why they should be asked to forfeit half of their right (from 36 months to 18 months) to recover legitimate overcharges from motor carriers when they bear minimal risk of exposure to bankrupt carrier claims for additional freight charges? NAFTC asks the same question of Congress. There are hundreds of thousands of these small shippers out there and they do deserve an answer.

NAFTC remains firmly committed to legislative relief for the bankrupt carrier due bill situation and believes that can be accomplished without reducing the statute of limitations applicable to over and undercharge claims. Many shippers have been victimized by desperate and/or unscrupulous motor carriers who went bankrupt and that problem needs to be addressed. NAFTC hopes Congress will act quickly to provide that relief, but, that in so doing it does not inadvertently penalize thousands of its other constituents, large, medium and small, all of whom are entitled to equal consideration.

Robert E. Davis 4th
ROBERT E. DAVIS, President

Donna F. Behme
DONNA F. BEHME, Executive Director

Senator EXON. Thank you very much, Mr. Davis, and thank all of you for excellent testimony.

Mr. DAVIS. Mr. Chairman, I am sorry, sir, if I may interrupt. Mr. Sweeney just reminded me of something. Yes, we do support the new bill with the exception of the 18 months' statute.

Thank you, sir.

Senator EXON. I appreciate your excellent testimony.

Once again, let me try and nail down some of this for those of us who are not members of the legal profession. As I understand it, the statute on the books today, that seemingly the Supreme Court put a different connotation on, requires that the shipper check with the ICC documents to make certain that the rate that was negotiated was filed. Is that correct?

Mr. SWEENEY. That is right.

Senator EXON. I suppose that might be all right for large organizations that have one or more people or a whole department negotiating on rates and have experts in the rate-making field in this particular area, but I draw on some experience that I had as a very young man. Going to the University of Omaha I had a part-time job as a rate clerk for Merchant's Motor Freight. It was the worst job that I ever had in my life.

I went into politics.

It was a whole lot less demanding.

So I have had some experience. I remember very well, I made frequent mistakes, and these irate management and these irate truck drivers would come in and lace me out for making a mistake either in interpretation of the rates, which I knew nothing about, plus the fact that I made typing errors when I typed up the bill of lading. So, you know, I have had that little bit of experience and I think I know how complicated this whole field is.

But to follow up on the point that I made earlier and the point that you made, Mr. Davis, with regard to the thousands of relatively small manufacturers who do not have experts in their company or corporation who are up on all of these things, nor do they have the time to check it all out, it seems to me that what the Supreme Court has handed down might work fairly well for large corporations with experts in the transportation field, but it would leave the smaller companies more or less out on a limb. Was that the point that you were trying to make, Mr. Davis?

Mr. DAVIS. Thank you, Mr. Chairman. Not exactly.

It is our feeling that—there are hundreds of thousands of small shippers, of course, who are not represented in this hearing. I would like to think that I do represent some of them.

About a year-and-a-half ago, I had at that time about 325 clients. We polled those clients. We had about 70 responses. Of those 70, 66 did not want a shortened statute of limitations. One of the other questions we had on that questionnaire was how they felt about the Interstate Commerce Commission, and were they in favor of an ICC that upheld the law?

A year ago, or a year-and-a-half ago, many of us felt that the current Commission was not upholding the law that Congress passed in 1980. I think without exception, every one of them wished that the Interstate Commerce Commission would have been more forceful in upholding the law and checking for filed tariffs, and yes, we

realize they do not have a lot of people. We wish you would give them a few of those people back and enable them to do that job, and I think therein is where the small shipper gets their protection, is from knowing that there are a few regulators in Washington looking out for them.

Mr. BONA. Mr. Chairman, if I may. By any standard, I think it is fair to say that Mobil Oil is a large shipper. And let me tell you that this issue has relatively little import to a company my size. However, you are absolutely right, the small shippers of this country are going to suffer greatly, in my opinion, because of the reasons that you outlined. They will not have professional transportation people on their staff.

The Chairman of the ICC, Chairman Philbin, pointed out that there are some 40,000 motor carriers in this country, and there are some 5 million tariff books that are filed every single year. Some years ago the Government Accounting Office estimated there was 1 trillion freight rates filed. Now a small shipper just cannot possibly keep up with that. We have a hard time ourselves within our company. But the small shippers will just suffer very greatly.

And I have a hard time understanding the fairness of holding an innocent party responsible for the non-action of a second party. I just have a difficult time understanding that.

Thank you, sir.

Senator EXON. Thank you, Mr. Bona.

As a former small businessman and shipper, to some extent, I just know that the small company that I used to own would be in deep, deep trouble, it seems to me, because we would ship things. And of course, during those days, the rates were set, so we did not have to worry about that. But I would think that, to a small businessman today, that would be a very, very troublesome thing.

Let me ask you this general question.

What is the current practice in the marketplace in light of the court decision and the attention that was given to all of this matter with regard to negotiated rates? In other words, are shippers now demanding proof that tariffs be filed?

I suppose some shippers are. But, on the other hand, I suppose there are a whole lot more than that who fail to comprehend the liability that could befall them as a result of the Supreme Court decision.

Mr. SWEENEY. Mr. Chairman, I think the answer to that is, as a shipper, whatever your size, if you ask the carrier to send you the rates, he will send you your page of rates, or two, or whatever it is. And you have that, and you say well, here is the rate. And let us say the rate is a dollar. In addition to that, there are other books of tariff, big thick books, several inches, that have rules in them and have classifications and things like that.

Senator EXON. I remember that from my ratemaking days.

Mr. SWEENEY. That is right.

So you could have the $1 dollar rate right in front of you very clearly, and then some auditor could come back three years later and say, well, your commodity was not number 10705, it was 10706. Or your shipping point was not Hot Springs, Arkansas, it was someplace five miles beyond that, and a whole series, any way they can, to take that rate away from you.

So no matter how big your company is, or how small your company is, you cannot sleep at night because you do not know what is in those tariffs. They have expanded from the size of the congressional budget; today there are probably 1,000 congressional budgets on file at the ICC. No shipper, however small or however large, can be confident that they are not going to get back-billed later on when they stop doing business with the carrier or the carrier goes out of business. The goodwill is off the table and it is in the hands of somebody who gets 50 cents on the dollar to find a way to do you out of your rate. And that is the situation.

Mr. AUGELLO. Mr. Chairman, may I add?

Senator EXON. Yes, Mr. Augello.

Mr. AUGELLO. The typical rule that we are finding in some tariffs, dating back to 1985, is that if the shipper did not pay his freight charges within 15 days, he lost all of his discount. The problem was that the salesmen were never informed that that rule was inserted in the rules tariff. It was put in by the carrier's president or traffic manager. No one ever told the shipper about that rule, and the shipper paid the freight charges within 30 days. When these auditors find that he has violated that rule, they file an undercharge claim seeking collection of the discount. That is just one example.

The Supreme Court touched upon the situation that you referred to earlier, Mr. Chairman, in that it said that shippers have the right to hire these private services in Washington who will check the tariff for you on an up-to-the-minute basis. That is simply not a practical solution. You cannot have hundreds of thousands of shippers calling the four or five tariff watching services in Washington every day to check every rate that they have been quoted by a carrier. It is simply impractical.

It is the constructive notice doctrine that is at the root of this whole problem. I mean that shippers are charged with constructive notice of every rate that is filed in Washington. It simply is not workable. Not in the environment that Congress created in 1980. It may have been previously, but not since that time.

Senator EXON. I hate to disagree with you, Mr. Augello, but I suspect that members of the Supreme Court who are lawyers probably would not agree with your statement. I think there are plenty of lawyers in Washington, D.C., that could be retained if they wanted to, by even the smallest shipper to keep them abreast of the situation. Therein lies, I suggest, the problem that we are confronted with.

Thank you very much.

I would advise my two colleagues that, by necessity, I must be on the floor for the next half hour. I wonder if I might impose upon Senator Pressler, and then Senator Burns, to proceed with questioning, and chair the hearing until I return.

Senator BURNS [presiding]. I am going to ask a couple of questions, and then I have to leave. This is a terrible way to run a railroad or a truck outfit.

I am wondering, let us say I am a shipper, and you guys can respond to this, I am a shipper. A truck line comes in and we negotiate a rate of what he wants to haul it for. I would be remiss and probably I would not sleep very good at night until I had bona fide

proof that they had filed that rate with the ICC. Is that correct? Am I correct so far?

Mr. SWEENEY. Not in all cases. We had a shipper call our organization two weeks ago and ask this question: "What is a tariff?" Some of these people are so small, they do not even know what a tariff is. They have no idea that these rates are filed with the ICC.

Senator BURNS. Okay, but let me continue on. So they file the rate that we are going to do business with?

Mr. SWEENEY. The carrier files the rate.

Senator BURNS. Okay, whatever this carrier does. And all at once, after five or six years, and maybe the rates go up a little bit, we renegotiate that because diesel fuel goes up, or whatever, and we have got to make some adjustments. And we do that. And every time it is refiled.

Then, all at once, I find out that when I quit doing business, that they could come back and some hotshot lawyer is going to come back and say you did not pay enough, now you owe some more?

Mr. SWEENEY. That is correct. That is what is happening.

Mr. BONA. And you are right, Senator, it could be five years after the fact. That is right. And it could be for just a very minor technical non-adherence to the requirements of the tariff that would require you to pay substantially more than what you negotiated. That is right.

Mr. SWEENEY. It is frequently twice as much money as what you originally paid.

Senator BURNS. In other words, what we are saying here is, a deal ain't a deal?

Mr. FERNLUND. Only in common motor carriage is a deal not a deal?

Senator BURNS. We could solve this whole thing by shutting down the law schools.

I am just trying to clarify in my own mind how come I guess whenever a common carrier publishes a rate, in other words, if I want to haul a particular commodity or product from my hometown, say, Billings, Montana, to Bismarck, North Dakota, there is a rate on file for that. Is that correct?

Mr. BONA. Yes.

Senator BURNS. Now that rate, in other words, I can go to a carrier, say, CF or whoever, and say, okay, I would like to do this, and I am going to guarantee you so much tonnage or so much product, will you carry it for less. But they will not carry it for more. Is that correct? Or they might want more?

Mr. BONA. That is essentially correct.

Mr. SWEENEY. You wind up with two rates. There is the rate that was on the books before you sat down together, say, the $2 rate. And you said to them, well, I want a better rate. And then they say, okay, $1.50, we will publish $1.50. And if they do not publish $1.50 by some accident or whatever, five years later somebody comes back to you and wants the $2. Because that $2 was published. It is just a rate that nobody pays. It is a high rate and everybody gets a break off of it. It is sort of like a list price, if you will.

Mr. BONA. And it could very well be, Senator, that if you were unable to negotiate a lower rate, you may elect not to try and get

into that market because you could not afford to do it at the higher rate. And so your negotiating a lower rate enables you to get into a market you might not ordinarily wish to serve, and then five years later, after you are in the market for five years at a lower rate, you find out that the economics have all been washed away by either a fraudulent or careless act, or a technical minor violation.

It just does not make any sense.

Mr. AUGELLO. Senator, the real inequity of the situation is where the parties agree to that rate to the exclusion of that carrier's competitors, who perhaps would offer the same rate. The shipper selects that carrier based upon his promise to publish the rate. Then five years later, we find out that he did not.

That shipper could have used other carriers at the same rate level but did not, because this carrier agreed to publish it. And that is the basic inequity of the whole situation. Shippers had options. They did not have to deal with these particular carriers, but chose to do so on the promise that the rate was lawful.

Senator BURNS. Well, basically what I am hearing there is that as a shipper I do not have the choice to select the people I want to do business with.

Mr. AUGELLO. Well, yes, you do. But what we have learned from the Supreme Court now is that every shipper has got to check every rate that is quoted by the carrier and make sure that he has a filed tariff reflecting that rate with no hidden limitations in the rules tariffs. It is wholly impractical to do that.

Senator BURNS. I will turn it over to Senator Pressler, as I have to go. I thank you for your testimony. I am just trying to clarify it in my own mind. I do not know what direction we are liable to take off into, but "a deal ain't a deal".

Senator Pressler.

OPENING STATEMENT BY SENATOR PRESSLER

Senator PRESSLER [presiding]. Thank you, Mr. Chairman. I first want to thank you for holding this hearing on negotiated rates. This is a very serious issue we will be addressing and I want to stress from the outset my concern over the present state of interstate transportation rates. I certainly hope that through our hearing today, we can better understand the problems that exist in interstate transportation, and that we can develop a better perspective in solving them.

With that, Mr. Chairman, I will close my opening remarks. I welcome our witnesses and look forward to hearing from all of you.

Let me just follow up on Senator Burns' question briefly. First of all, who here would be speaking for small business?

Senator PRESSLER. What if a small businessman was a shipper. Who would be speaking for small business shippers

Mr. FERNLUND. Mr. Pressler, I would like to address that.

Earlier in my comments I mentioned that the Transportation Brokers conference consists of 1,400 members who are primarily small businesses in the brokerage industry. We represent a great deal of traffic that moves from small shippers to smaller receivers, small- to mid-size companies, and service primarily small- to mid-size carriers' needs as well.

Senator PRESSLER. All right. Now, do most small businessmen have only one or two choices? I would guess that a small businessman in my State of South Dakota would not have many alternative sources, so what if a price were set, for example, well above the published rate. What relief or what option would that small businessman have

Mr. FERNLUND. Senator Pressler, I have an office in Sioux Falls, South Dakota. I do not believe that there is a small business in your state that does not have a multitude of options for selecting carriers to move his product.

I would also submit to you that there are probably very few shippers in your state who are paying rates that are even at the filed tariff level without some type of discount.

Senator PRESSLER. Okay. Do you think there are any at all

Mr. FERNLUND. Paying higher than tariff rate? No.

Senator PRESSLER. Well, what if that were the only option available? I mean, are there any in the United States who are paying higher?

Mr. FERNLUND. I do not believe so, no.

Senator PRESSLER. What if that situation came about? What relief would they have

Mr. FERNLUND. They have the transportation brokerage industry to rely on to kind of temper the marketplace, if you will.

Senator PRESSLER. What would he do, though? For example, what would that small businessman do

Mr. FERNLUND. The broker representing more than one shipper, obviously, is involved in moving what amounts to substantial volumes of traffic. They are in the marketplace daily buying and selling transportation. They know what a fair and equitable price would be for the service, and they would insure that that small business had at least as many options as Mobil Oil would have for moving their product.

Senator PRESSLER. Let us say you wanted to ship grain or products out of Kyle, South Dakota. What would your options be in terms of a shipper?

Mr. FERNLUND. After Sioux Falls, I get real lost in South Dakota.

Senator PRESSLER. But you said just a moment ago you knew everybody in South Dakota had several options.

Mr. FERNLUND. Yes, they do; and it kind of depends on commodity shipment size. There is a multitude of truckload carriers——

Senator PRESSLER. Well, let us say Kyle, South Dakota. How would you ship furniture from Kyle, South Dakota if you were a small businessman?

Mr. FERNLUND. Household goods, furniture, I would contact a moving agent or a household goods broker who would contract with one of the major van lines to move the product. If I were a shipper of general commodities, there are regular route carriers that will service Kyle, South Dakota.

Senator PRESSLER. You are sure that there is more than one option there?

Mr. FERNLUND. I am certain I could find more than one option there, yes.

Senator PRESSLER. Well, for the record would you do that later on?

Mr. FERNLUND. Certainly.

[The information referred to follows:]

Shippers of small shipments are serviced by United Parcel Service, Inc., (UPS). UPS handles shipments into and out of Kyle, SD, up to their maximum shipment size of 500 pounds.

For other less than trailerload (LTL) shipments, those in excess of 500 pounds, into or out of Kyle, SD, there are three regular route common motor carriers who offer service. Ross Transfer, headquartered in Omaha, Nebraska, offers service one to two times each week from their terminal in Rapid City, SD. Lewis Truck Lines, headquartered in North Dakota serves Kyle, SD, each Tuesday and Thursday from their terminal in Winner, SD. Rude Transportation, headquartered in Redfield, SD, serves Kyle, SD, each Tuesday and Thursday from their terminal in Rapid City, SD.

There 484 ICC authorize motor carriers domiciled in the state of South Dakota. many of these are truckload motor carriers holding certificates and permits authorizing them to serve all points in the United States.

In addition, the Transportation Brokers Conference of America has four member brokers who are in the state of South Dakota. These member brokers, and those in neighboring states are authorized to arrange transportation to and from all points in the 48 continental United States. My firm, Twin Modal, Inc., has written contracts, and ongoing business relationships with 46 contract motor carriers domiciled within the state of South Dakota.

These are the options that a shipper or receiver in communities like Kyle, SD, have to find truck service that is price and service competitive.

Senator PRESSLER. I think it is important that we understand the problem of small business shippers in some of these areas, because they are not familiar with all the ins and outs of what we have brought up here.

Going back to this bankrupt thing, are there other circumstances other than bankruptcy where the rate can be charged at a higher level?

Mr. AUGELLO. Yes, Senator Pressler. This situation is not confined to bankrupt carriers. Carriers close down their doors and then have their freight bills audited knowing full well that they have failed to file tariffs. We have documented case after case where a decision was made by upper management not to file tariffs. In a freight forwarder case we have testimony that the president told the tariff publishing official not to bother filing rates in his tariff any longer, just put them on the computer.

So this is not just a bankrupt carrier situation. A company can sell their whole operation but retain the freight bills solely for the purpose of having an audit performed. They have done that knowing full well that there is "money in those bills," so to speak.

Mr. SWEENEY. You can have a situation where a shipper is using a particular carrier and they have a falling out. The shipper says I am not going to use your carrier any more, and he transfers the business. Now a carrier could take a very hard line and go back and bring up the last three years of shipments and go through them with a magnifying glass and try to find some way to defeat the rate that was paid that they had understood.

This is certainly not a common situation, but it is a vulnerability of a shipper to a carrier who wants to go after the shipper after the shipper stops using him. As long as the goodwill is there, as long as you are using the carrier, you are not going to get this kind of the hard-line, go-get-'em type approach. So it shows up most frequently if a carrier goes bankrupt. They have nothing to lose. They turn on everybody to try to get the money out of the shippers.

Senator PRESSLER. Thank you very much. I am not in charge of this committee, but we will recess. Thank you.

[Brief recess.]

Senator EXON [presiding]. The Subcommittee will please come to order again.

I will call the second panel together. Mr. James C. Harkins, Executive Director, Regular Common Carrier Conference; Ms. Lana Batts, Senior Vice President of the American Trucking Association; and Ms. Judy L. Woods, Special Counsel to the Unsecured Creditors Committee for Overland Express, Incorporated.

Thank you for being here, folks. And I do apologize for having to temporarily interrupt the flow of the Subcommittee. And I apologize to all for any inconvenience that the Chairman may have caused you, but it was necessary that I be on the floor for the last half an hour. And so now we are ready to proceed.

If there are no objections or other suggestions, I will then begin with the first name on the suggested list here, Mr. James C. Harkins.

Mr. Harkins, thank you and welcome.

STATEMENT OF JAMES C. HARKINS, EXECUTIVE DIRECTOR, REGULAR COMMON CARRIER CONFERENCE; ACCOMPANIED BY KEVIN WILLIAMS

Mr. HARKINS. Thank you.

I have with me Kevin Williams, who is General Counsel for the Regular Common Carrier Conference. He is a lawyer.

Senator EXON. I figured that.

Mr. HARKINS. Since I am not a lawyer, but I practice frequently, he is here to tell me when I am getting in trouble, but not how to stay out of it.

As you know, we represent the full service motor carrier, the carrier that handles principally general freight and principally LTL-type freight. Because of the fact that these carriers haul virtually everything from and to anywhere, we have the greatest demand and the greatest need for a comprehensive pricing system.

Now the tariff system has served that need well. That is, it has served it well until about the last five years, when a since-departed majority of the Interstate Commerce Commission encouraged a program of secret rates and administrative abandonment by them of their tariff review obligation, which made clear to the transportation population that the filing of tariffs was considered by them a virtual waste of time.

Now it is because of this past policy of the ICC, which encouraged shippers and carriers to ignore this and other aspects of the Interstate Commerce Act, that we have this problem. And if I might, I would like to focus a little bit on this problem and what caused it. So much has been said this morning which would indicate that the Supreme Court decision is the problem or the carriers doing this or bankruptcy is another part of the problem, et cetera, and so on.

But the real problem is because of the fact that the past Commission put forth a policy which essentially told carriers and shippers

do not bother with that portion of the law. Do not bother to file your tariffs. We think it is a waste of time.

Now I think it should be understood that for some 55 years or more, 1935 to 1985 actually, this was not a problem. Even five years into the Motor Carrier Act of 1980, carriers and shippers were able to depend upon the filed rate tariff and function to make transportation services available and price them without any difficulty. Even today, with respect to the type of regulated transportation that takes place within the states across this country, it does so on the basis of tariffs and filed rates, and there is no problem with respect to the intrastate application of rates, no problem of this nature at all.

It has only been since the Interstate Commerce Commission espoused a policy of suggesting to carriers and shippers that they ignore tariffs that this has come about. So it is really not a situation where we should try to look at the difficulties of today and seek specific solutions for that, as much as it is that we should recognize that the real problem comes about and can be solved by having the Interstate Commerce Commission require carriers to adhere to the tariff filing requirements, and to do so in an open and unsecret way.

Now if we have that the type of difficulty that we have been experiencing over these past five years or so will not happen in the future. Now we certainly hope and the transportation fraternity expects that the ICC will immediately take action to make clear that the requirement for understandable tariffs is going to be enforced and that those tariffs be filed, and, consistent with the Supreme Court decision which upheld the file rate doctrine, that shippers and carriers will adhere to those tariffs.

Now another remark was made earlier today about the fact that it was a difficult problem for small shippers. Really, small shippers do not have much of a difficulty because they do not ship that many products and they do not ship them to that many places. So the scope of the knowledge that they have to have about specific rates is not really that great.

But, aside from that point, small shippers are not having any problem shipping intrastate shipments under these types of procedures. And as I said, for the 55 years or so before 1985, they did not have any problem with respect to the tariffs on file and the charges that the carriers were assessing under those tariffs. It has only been a problem since the Commission has suggested that that policy was no longer appropriate in today's world.

Now I know a returning to that method of filing tariffs and adhering to the tariffs would eliminate this type of a problem. We are in support of the legislation as has been attached to Mr. Connolly's statement. That is a legislative proposal which we have worked out diligently with shipper representatives for over a year. And we think that that particular legislation would take care of the problems that have occurred and are pending over the past few years, and at least for 18 months into the future until such time as carriers and shippers have the opportunity to make sure that they abide by the Supreme Court decision and file their tariffs and file them properly.

In addition, one of the elements of the legislation would offer shippers and carriers an opportunity to solve errors of tariff filing which they did not have in the past. We think that flexibility is a good item and would take care of any problems which might arise in the future.

Thank you.

[The statement and questions and answers follow:]

BEFORE THE
UNITED STATES SENATE
SUBCOMMITTEE ON SURFACE TRANSPORTATION
OF THE COMMITTEE ON COMMERCE, SCIENCE
AND TRANSPORTATION

HEARINGS ON
THE FILED RATE DOCTRINE
AND
NEGOTIATED RATES CASES

TESTIMONY OF THE
REGULAR COMMON CARRIER CONFERENCE

I. INTRODUCTION

I appreciate this opportunity to testify on behalf of the Regular Common Carrier Conference (RCCC), a national trade association representing for-hire, less-than-truckload motor carriers of general freight. These interstate trucking companies are regulated by the Interstate Commerce Commission and must comply with the tariff filing and rate regulation provisions of the Interstate Commerce Act. Consequently, the RCCC motor carriers have a significant interest in tariff filing requirements and an appreciation for the problem of negotiated, but unfiled, rates.

II. EXECUTIVE SUMMARY

In this testimony, the RCCC will focus on three major issues. First, the filed rate doctrine must be continued. The

tariff filing requirement benefits both carriers and shippers by providing certainty that the rate on file will be charged and paid. The tariff or rate filing requirement is the cornerstone of the Interstate Commerce Act. It allows the ICC, shippers, and carriers to ensure that rates are reasonable, nondiscriminatory, and fair. Rate publication also promotes competition by disseminating price information which is important in an industry as large and diverse as trucking. Tariff rates are used to settle disputes between carriers and shippers about the proper rate. The tariff filing requirement is even more important today given the voluminous rate changes made daily in the trucking industry. Consequently, it is essential for Congress to admonish the ICC that the integrity of the tariff filing and rate regulation system must be preserved.

Second, the recent Supreme Court decision invalidated the Commission's policy on negotiated rates. The Court stated unequivocally that the agency lacks the authority to declare it to be an unreasonable practice for a carrier to collect the tariff rate when it negotiated with a shipper, but did not file, another rate. The decision has the immediate impact of exposing some shippers to undercharge claims from collection agencies representing bankrupt carriers. This is unfair and unfortunate. Legislation is necessary to give the ICC authority for a limited time period to provide relief to these shippers. However, it is important to understand that the negotiated rates problem is the unfortunate result of permissive rate and tariff compliance

invited and fostered by former ICC Chairman Gradison. Those shippers, which are now being trapped by the Commission's past actions, should be afforded relief. But, the Supreme Court decision has now put everyone on notice of the continued necessity of filed rates. Confidential rates that promote discrimination and abuses are not permissible; indeed, they have been unlawful for over fifty years. Therefore, the ICC only needs short-term authority to remedy this transitory problem.

Finally, legislation is necessary to address several aspects of motor carrier rate regulation and tariff compliance. They are similar, in principle, to the three provisions embodied in H.R. 3243. The negotiated rates problem can and should be cleaned up by giving the ICC the authority to review negotiated rate claims arising from shipments that occur up to 18 months after enactment of legislation. The ICC should be authorized to grant relief to shippers when appropriate.

The statute of limitations for overcharge and undercharge claims should also be reduced from three years to 18 months within one year of enactment of this legislation. This will reduce shippers' exposure to negotiated rate claims in the future. It will also reduce administrative costs for carriers and shippers associated with the processing and verification of stale claims. The three year statute of limitations is an anachronism.

Furthermore, legislation should provide a mechanism by which carriers and shippers can jointly correct, with ICC approval,

inadvertent tariff errors without exposure to civil and criminal penalties under the Elkins Act. Tariff errors do occur and a mechanism is necessary to correct them. The ICC currently has a procedure to waive undercharges for railroads. Motor carriers need similar authority.

III. STATEMENT OF POSITION

The LTL carrier industry favors a legislative solution to the problem for shippers and carriers related to negotiated, but unfiled, rates. This situation was spawned by a renegade ICC under former Chairperson Gradison and now has to be brought to Congress for a remedy as a result of the Supreme Court's clear restatement of the law requiring filed rates.

It is indeed unfortunate this has happened at all. Had the ICC properly discharged its duties under the law, we would not have this problem today. Prior to the Gradison term, there was not a problem with carrier rates not being filed. We do not see unfiled rates at the state level where the regulatory agencies follow their legislatures mandate to monitor tariff filings and rates. Hopefully, those entrusted to administer the Interstate Commerce Act will not burden carriers, shippers, and the Congress with future administrative violations of the law.

As a starting point, the ICC should take immediate action to restore the integrity of the tariff filing system. All filed rates must be clear and concise. Tariffs containing a range of

discounts and special customer codes must be eliminated since their secrecy violates the fundamental principle of public rates known to all parties. Such tariffs can encourage discriminatory, unfair pricing contrary to the dictates of the statute.

In addition, the ICC should act upon the RCCC petition to prohibit the payment of rate discounts to parties who are not paying for the transportation. Such arrangements deceive and unfairly burden the customer who is actually paying for the transportation. This is an unethical, unreasonable business practice which undermines the integrity of the tariff filing system.

The Supreme Court has made plain those elements of the law relating to tariffs and the carriers' rates.

1. The statute is designed to promote competition, while requiring the ICC to ensure that the rates are reasonable and not discriminatory.
2. The public filing of rates with the ICC is the method chosen to facilitate these goals.
3. These rates must be open to the public; there can be no secret rates. The tariffs must be understandable, and the rates contained in such tariffs must be charged.

If the ICC enforces the law, as interpreted by the Supreme Court, there will be no future problems of the nature now being faced by the shipper community. The Supreme Court has given a clear signal to shippers and carriers that for now and the future, they had better make certain that the rates agreed upon

to transport their freight are properly in tariffs on file with the Commission. That will preclude any recurrence of the past practice of negotiated, but unfiled, rates. Consequently, the ICC needs, and should only be given, the authority for a limited period of time to grant relief to shippers now confronting these undercharge claims. We believe that giving the ICC the authority to adjudicate negotiated rate claims arising from shipments that occur up to 18 months after enactment of legislation is a more than adequate time to remedy the situation.

This Supreme Court decision has accelerated the process of carrier and shipper compliance that began several years ago when the negotiated rates situation received notoriety. Shippers are now contacting their carriers and insisting on proper tariff filing. They are verifying that the terms upon which they have agreed are put in a legally filed tariff.

In short, adherence to the law will preclude future incidents of claims against shippers based on filed rates, because shippers will ensure that carriers will file those rates before they use their transportation services. If there are any claims, they will be legitimate ones based on the legal tariff, which is how it should be.

Our proposal also contains a provision for carriers and shippers to jointly correct, subject to ICC review, inadvertent tariff errors. This is to cover those circumstances where a carrier had made a bona fide error in tariff publication and waives the collection of additional charges which would result

from that error. In light of the fact that there are publication errors, this is a reasonable way to correct them for past shipments. The railroads already have such a mechanism at the ICC.

Lastly, our proposal would reduce the current statute of limitations from three years to two years and then 18 months a year after enactment. These are more reasonable time frames for the filing of overcharge or undercharge claims today where carriers rate and bill millions of shipments daily.

Respectfully submitted,

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July 17, 1990

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August 2, 1990

Honorable Ernest F. Hollings
Chairman
Committee on Commerce, Science,
and Transportation
United States Senate
125 Russell Building
Washington, DC 20510-6125

Dear Chairman Hollings:

I would like to reiterate our appreciation for your Committee's prompt consideration of legislation to resolve the negotiated rates situation and other tariff matters. I am glad to respond to the additional written questions you and Senator Pressler sent to me in the July 24th letter.

Question No. 1 : Changing The Statute Of Limitations For Overcharge And Undercharge Claims.

Section 3 of S. 2933 would reduce the statute of limitations for both overcharges and undercharges from three years to two years upon enactment into law and then further reduce it to 18 months one year later. This phased-in reduction of the statute of limitations is an integral part of the remedy to the negotiated rates problem. In fact, when the shipper associations and our Conference first started addressing potential remedies, the counsel for one shipper association proposed a six month statute of limitations as the sole solution to the negotiated rates problem. The rationale obviously is that a reduced claim period cuts off longtail liabilities regarding freight payments and collections. Ultimately, both the shippers and carriers felt that six months was too short a period to file and process claims and legitimate ones might one unfairly cut-off. Consequently, we settled on an 18 month period which will reduce by 50 percent the potential liability for shippers.

The current three year statute of limitations is outdated in today's competitive, computerized industry. It is in the interest of both shippers, in the case of overcharges, and carriers, in the case of undercharges, to file such claims as soon as possible in order to get the money they are owed with little or no delay. The longer one has to process such matters, the greater is the tendency to put them off, and when you wait three years, the claims are more difficult to research and settle since records may be misplaced or personnel have changed. An 18 month statute of limitations is more than adequate for both sides to process claims and will substantially reduce administrative costs.

In sum, the statute of limitations provision is an important part of the legislative relief to the negotiated rates problem. In fact, the bill's three provisions are integrated and complementary; each providing a means to address past or future tariff errors or claims.

Question Nos. 2 & 3 : Scope Of Legislative Relief.

As the Supreme Court emphasized in the Maislin case, the tariff filing requirement is an essential element of the statute. It provides the mechanism for public disclosure of rates and the detection and removal of unlawful rates. There are two main requirements to fulfill these duties. First, the ICC must ensure that rates are being filed in tariffs. Second, the ICC must make sure that the filed tariffs are understandable. They must clearly disclose the actual rates that will be charged and the beneficiaries of those rates.

We suggest that the ICC can immediately take the following steps to accomplish this goal.

First, the ICC should issue a policy pronouncement affirming that all common carrier rates must be published in tariffs; that it will not tolerate noncompliance. Such a policy announcement will both reeducate the parties, as well as act as a deterrent to future transgressions. We do not see this "negotiated rate problem" at the state level because state regulatory officials have clear positions supporting tariff filings and the industry knows that sanctions will result for noncompliance.

The ICC could also take the approach now used by the Federal Maritime Commission. As you can see from the attached Journal of Commerce article, the FMC has a voluntary or amnesty program where they are encouraging the parties to voluntarily disclose illegal rebating schemes by August 28 or face the full sanctions under the law in the future. Such a program is effective in disclosing individual violations, and on the larger scale it has a significant and sobering effect in making clear the potential liabilities of future violations.

There is every reason why the ICC should do the same. Those who argue that there is no way the ICC can monitor the million tariff filings annually miss the point. No federal agency, whether the IRS, SEC, FMC, etc., monitors each transaction. Rather, they establish clear policies, perform spot checks and audits, and impose sanctions to punish individual violations thus deterring others. It is a fundamental of lawmaking and enforcement policy that everyone understands that it is better to comply than risk prosecution.

ICC Commissioner Lamboley reportedly has indicated that he believes that the ICC should investigate in these negotiated rates claims whether the carrier "intentionally" did not file a tariff. Willful violations are prohibited by the Elkins Act and can result in criminal or civil penalties. Such an endeavor would have a powerful deterrent effect. It would also apply to bankrupt carriers since the employees of the company could be held accountable for their actions. A single test case would have a significant impact on future compliance.

There are also several other actions the ICC should immediately undertake. They must act to restore the integrity of the tariffs themselves. Indeed, we have petitioned the ICC to remove certain unlawful tariffs. They include "write-in" or "range" tariffs, where there is no way of determining which of a series of rates will apply to a transportation service. Such tariffs keep the actual rates secret and facilitate discrimination. The Maislin decision clearly warrants their removal.

Second, the tariffs which apply only to a secret customer code must be changed. Again, they are designed to hide the beneficiary of a preferential rate. They violate the public disclosure dictates of the statute. And, it is unnecessary that they be secret since the carriers can legally publish rates for a named shipper.

Third, we have also petitioned the ICC to prohibit what we call "off-bill" practices. Essentially, this is a practice where a large volume shipper, who is not paying for the transportation, wants to get all or a portion of a rate discount, but does not want its customer (who is paying the transportation charges) to know that fact. The less sophisticated customer receives a carrier freight bill for the full tariff rate, and the discount is then secretly given to the shipper, who is not paying for the transportation. The shipper thus increases its sales price of the product through inflated transportation rates. The RCCC has petitioned the ICC for a simple rule providing that whoever is paying for the transportation service should get the rate discount. This would eliminate the carrier as a middleman in such schemes. Also, it ensures that customers know the true transportation rates and where it is an appropriate consideration the shipper and receiver can decide who pays what.

Each of these changes would improve the tariff filing system.

Senator Pressler's Question No. 1 : Regarding Discriminatory Pricing and Impact of Enforcement of Filed Rates.

There is indeed discriminatory pricing in the trucking industry, much of which is lawful and some which is not. The statute prohibits "unreasonable" discrimination which is different rate treatment among similar customers that cannot be justified on transportation cost differences. For example, when a shipper tenders significant freight volumes or cargo in aggregated shipments, this will reduce a carrier's costs and the lower rate is justified. However, some significant rate discounts are below the cost savings to the carrier and must be made up by charging other shippers higher rates. This is an example of unreasonable discrimination.

Enforcement of the filed tariff rate and the changes we suggested in response to the above question would help curb these practices. Discrimination is more able to occur when rates and practices are secret. Tariff filings provide disclosure and, therefore, would minimize the abuse since such practices cannot stand the light of public knowledge.

Question No. 2 : Total Money At Stake In Trucking Bankruptcies Where Undercharges Are The Main Or Sole Asset.

We cannot answer this with any degree of certainty since we are not involved in any of the particular bankruptcies and are not aware of the assets of the companies. As a general response, we would note that the ICC stated at the hearing that it currently has 105 undercharge claims pending totalling $4.8 million. Moreover, the trade press estimates that total claims could total $200 million.

It is unclear what assets other than these claims are available. A carrier will have transportation and office equipment, terminals, and accounts receivables. Some may be pledged to secured creditors, others may be available to unsecured creditors.

It should be noted that only a small percentage, about 20-25 percent of the total undercharge amount, would be available to creditors. The collection agents' commissions and attorneys' fees consume about 75 percent of the money collected.

Unfortunately, this is the only information we have on the subject.

If we can be of further assistance, please contact us.

Sincerely,

James C. Harkins

Senator EXON. Thank you, Mr. Harkins.

We will proceed with the rest of the testimony, and then I will have some questions.

Ms. Batts, we welcome you here.

STATEMENT OF LANA R. BATTS, SENIOR VICE PRESIDENT, AMERICAN TRUCKING ASSOCIATIONS

Ms. BATTS. Thank you very much, Mr. Chairman. It is awfully hard to be original after I have agreed with everybody who has come before in terms what the cause of the problem is, and what the solutions to the problem are.

Senator EXON. Could you pull your microphone a little bit closer. I think I can hear, but I am not sure the people in the back of the room can.

Ms. BATTS. Within the American Trucking Associations, many of our members are regulated by the Interstate Commerce Commission, and as such, are subject to the rules and regulations of that Commission. As such we have a lot of interest in what is happening because of the impact prior actions of the ICC are having, and certainly what impact the Maislin case is going to have on the future.

Like Mr. Harkins, I think the root cause of the problem was the attitude taken by the prior Chairman and the then Commissioners who basically ignored the tariff filing requirements. When the issue was brought to a head several years ago, the ICC's solution was to find that the collection of lawfully filed tariffs to be unreasonable. Rather than enforcing their own rules, the Commission decided to take a totally different tack.

The Supreme Court viewed that decision, I think, rightfully, and said that it is now time to look at the actual filed tariff doctrine and require the Commission to adhere to that doctrine.

From our standpoint, everyone is now on notice of the necessity that the rates are filed. We do not feel that it will be a problem for the carriers to file them. Certainly, as Mr. Harkins has indicated, there is a long history why those tariffs should be filed.

The reasons for the filed tariff doctrine which the Supreme Court outlined, are: To prevent rate discrimination, to promote competition, to ensure that the rates are reasonable, and to provide public notice of the common carrier rates. We believe that the ICC enforcement of those rules should continue. And we think that proper enforcement will ensure that these problems do not reoccur in the future.

The need for the legislation is very self-evident. When the bankruptcy ruling started to take place, Carriers and shippers, recognized there had to be some solution which included a legislative solution. They worked very diligently on that solution for over a year. We have draft legislation that, with some minor modifications to reflect the *Maislin* decision, will solve this problem.

It will help the shippers in Nebraska. It will help whether they are large or small. It will certainly allow the carrier to know where they should be coming from. Because we are talking about the surviving carriers who are trying to compete, knowing what the tariffs are from the other carriers.

Therefore, the American Trucking Associations supports the legislation in H.R. 3243 with the kinds of changes that have been agreed upon by the shippers and the motor carriers. I think the record ought to show that this is a case where both groups agree that this legislation is needed and have agreed upon the principles in that legislation.

Thank you very much.

[The statement and questions and answers follow:]

TESTIMONY OF THE

AMERICAN TRUCKING ASSOCIATIONS, INC.

Mr. Chairman, and members of this Subcommittee, my name is Lana Batts, and I am Senior Vice President, Government Affairs of the American Trucking Associations, Inc. (ATA). ATA is the national trade association of the trucking industry. ATA's membership includes more than 4,000 carriers and industry suppliers of all sizes and types. In addition, membership in our 51 state associations and 10 conferences totals over 30,000 trucking companies. Many of these member trucking companies are regulated by the Interstate Commerce Commission and must comply with the tariff filing and rate regulations provision of the Interstate Commerce Act. ATA, therefore, has a significant interest in the tariff filing requirements of the Interstate Commerce Act and has an appreciation for the problem of negotiated, but unfiled rates. I am grateful for the opportunity to present ATA's views on this subject and to state this association's, and its members, support for a legislative solution to this problem.

My remarks, today, will address several issues:

- o The cause of the problem; and
- o The need for legislation that addresses the problem.

I believe it is important to understand that the unfiled rate problem is the result of ten years of neglect by past ICC administrators that permitted carriers and shippers to ignore the tariff filing requirements of the statute. Even after the problems was brought to the agency's attention in the mid-1980's through the shippers' requests for relief, the ICC's "solution" to the problem was to find that the collection of the lawfully filed rate was an unreasonable practice, rather than take the more effective approach of enforcing the tariff filing provisions of the statute.

By striking down the ICC's policy, the Supreme Court has now eliminated any doubt as to the validity of the tariff filing requirements under existing law and neither carriers nor shippers should have any doubt at this time as to the need for or the importance of the tariff filing rules.

The Court's decision has put everyone on notice of the continued necessity of filed rates. We believe, as does the Court, that the Filed Rate Doctrine continues to be valid. The purposes of the Filed Rate Doctrine are to:

- o Prevent rate discrimination;
- o Promote competition;
- o Ensure that rates are reasonable; and
- o Provide public notice of common carrier rates and rules.

ICC enforcement of the tariff filing requirements will ensure that these goals are accomplished and will also ensure that the current situation does not re-occur.

In addition to understanding the causes of the problem, there is a need for a legislative solution to the problem. ATA, RCCC, and the various shippers' interest have recognized this and have been working towards a solution for more than a year. The Supreme Court's recent decision in Maislin should remove all doubts as to the need for Congressional action.

The ICC's failure to enforce the tariff filing rules has resulted in hundreds of shippers being trapped in situations for which there is no exit without the proposed legislation.

The legislation solution which we support is similar to H.R. 3243, with certain revisions, either made necessary by the Maislin decision or agreed upon by shipper and carrier interests so as to make the solution more responsive to the problem.

These provisions include:

1. Granting of limited authority to the ICC to determine the reasonableness of requiring a shipper to pay under charges;

2. Reducing the statute of limitations on over and under charges from 3 years to 18 months. The reduction of the statute of limitations will reduce shippers' exposure to negotiated rate claims in the future. It will also reduce administrative costs for carriers and shippers associated with the processing and verification of stale claims.

3. Provide a mechanism by which carriers and shippers can jointly correct, with ICC approval, inadvertent tariff errors with out exposure to civil and criminal penalties under the Elkins Act. Tariff errors do occur and a mechanism is necessary to correct them. The ICC currently has a procedure to waive under charges for railroads. Motor carriers need similar relief.

This legislation, which is supported by the major trucking and shipper associations, will be a significant factor in resolving the unfiled, negotiable rates problem, but prevention of its reoccurrence is another major step in resolving the problem and only effective enforcement of the tariff filing requirements by the ICC will accomplish that portion of the solution.

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August 6, 1990

The Honorable Ernest F. Hollings
Chairman
Commerce, Science
and Transportation Committee
United States Senate
SO-508 Dirksen Office Building
Washington, D.C. 20510

Dear Chairman Hollings:

The following are ATA's responses to the questions attached to your July 24, 1990 letter on the negotiated rates issue. I hope this information is helpful and I thank you for the opportunity to respond to these questions:

Changing Statute of Limitation for Over- and Undercharge Claims

1) **Question:** The testimony of two witnesses on Panel #1 suggested that changing the statute of limitations applicable to over- and undercharge claims is unnecessary to accomplish the legislative relief needed to address the negotiated rates matter. Do you believe such a change in the statute of limitations is critical to the enactment of legislation, and if so, why?

Answer: There are several reasons why the proposed reduction in the statute of limitations on over- and undercharge claims is critical. First, if no other change in the law were made than the reduction in the statute of limitations from thirty-six to eighteen months would, by definition, the number of claims should be reduced by 50%. Second, aside from the negotiated rates issue, there is no justification for the three year statute of limitations. If carriers and shippers engage in timely auditing of freight bills, then even the proposed 18 month period is unnecessarily long. We note that NASSTRAC originally proposed reducing the statutes to six months. The eighteen month period was agreed to by all carrier interests involved and the major shippers' organizations. Those opposing it basically represent auditor interests. The reduced statute would require auditors to hire sufficient and capable staff to perform an accurate audit the first time and would

discontinue the practice of multiple audits of the same freight bill stretching over a three year period. The administrative expense to carriers or shippers of such audit practices is unreasonable and unjustified. Finally, the support of ATA for the proposed legislation is conditioned on the inclusion of this provision.

Scope of Legislative Remedy

2) Question: You suggest that the unfiled rate problem is the result of years of neglect by past ICC administrators which permitted carriers and shippers to ignore the tariff filing requirements of the statute. What improvements do you suggest the ICC undertake to make the filing system more workable?

3) Question: What enforcement action by the ICC do you believe is necessary to ensure that the current situation does not recur?

Answer: These two questions can be answered together. The ICC administrators during the 1980 failed to bring even one proceeding to enforce the tariff requirements of the Act. Even after the NITL and others brought the unfiled rate problem to the Commissions attention and ATA and other urged the Commission that the best way to prevent the problem would be to enforce the tariff filing requirements, the ICC continued to ignore the cause of the problem.

There are several steps that the agency could take to improve the tariff filing system and make it more workable: Enforce the law; Go forward with its proceeding to bring about electronic tariff filing.

The past ICC administration attempted to use this proceeding to implement its desire to eliminate the tariff filing rules rather then to modernize them. The Commission should create an Advisory Committee, made up of agency, carrier and shipper representative which could determine the needs, procedures and standards required to implement electronic tariff filing. Electronic tariff filing would enable a carrier and shipper to agree upon a tariff rate; the carrier to file it electronically; and to have the new rate effective just one day later. The system would also enable shippers to have ready access to the Commission's tariff files to determine whether a carrier's rate were or were not on file.

4) **Question:** Do you feel that discriminatory pricing now exists in the trucking industry? If so, would the enforcement of filed rates curb these practices?

Answer: Because many rates are not filed and others are filed in such manner as to make it impossible for a third party to determine who they apply to, it is impossible to determine the extent to which discrimination may be occurring. The Supreme Court recognized in Maislin that the filed rate doctrine is the keystone to the entire Act and the principal purpose of the Act was to prevent discrimination. Thus, if the filed rate doctrine and other tariff filing requirements were enforced by the ICC, it would undoubtedly do much to prevent rate discrimination.

5) **Question:** What is the total amount of money at stake in trucking bankruptcies around the country where freight undercharges are either the main or sole asset of the estate?

Answer: ATA does not have the information to answer this question.

I hope these answers of some help to you in clarifying ATA's position on the negotiated rates issue and in possible solutions to the problem. ATA has been an active party in working with other carrier and shipper groups in seeking a solution to this problem and we are a strong advocate of the proposed legislation as it pertains to this issue.

In spite of the importance of finding a workable legislative solution to this problem, ATA is very concerned with Section 6, which would have a detrimental effect on the even more paramount issue of highway safety. This provision would enable states to exempt commercial vehicles merely because they are transporting farm supplies or equipment, a factor which does not excuse the need for safe operation of such vehicles, is unacceptable to the trucking industry and is not a part of the legislation agreed to by the affected parties. We urge its removal.

Respectfully submitted,

Lana R. Batts

Lana R. Batts
Senior Vice President
Government Relations

Senator EXON. Thank you, Ms. Batts.
Ms. Woods.

STATEMENT OF JUDY L. WOODS, SPECIAL COUNSEL, UNSECURED CREDITORS COMMITTEE FOR OVERLAND EXPRESS, INC.; ACCOMPANIED BY THOMAS AUCHINCLOSS

Ms. WOODS. Thank you very much.

Before we begin I would like to introduce Mr. Thomas Auchincloss, who is with me today. Mr. Auchincloss argued the Maislin-Primary Steel case on behalf of Maislin before the Supreme Court. Also with me is Mr. Joseph Steinfeld, who is General Counsel for the Creditors Alliance to Preserve Freight Undercharge Assets.

. Senator EXON. Would you pull the microphone up just a little bit please?

Thank you.

Ms. WOODS. I am an attorney. I am an attorney for the nearly 1,600 unsecured creditors of Overland Express. There are thousands of bankrupt carriers, some of whom have formed the Alliance to Preserve Freight Undercharge Assets, for whom I also speak. Overland was a truckload carrier in Indianapolis, Indiana, doing approximately $100 million annual business when it filed for relief under Chapter 11 of the United States Bankruptcy Code.

In many trucking company bankruptcies, freight undercharges are the only asset available to pay employees, taxes, trade, and other unsecured creditors. In the bankruptcies where undercharge audits have been done, undercharges represent a small fraction of the shipments which take place, whether measured by the number of shippers involved, the cost of these shipments, or the carrier's total revenue. Nevertheless, these undercharges are tremendously important to bankruptcy trustees and creditors.

Let me give you some examples of the importance of this, based upon the people and the businesses I represent. Robert Anderson was an outstanding driver and supervisor for Overland for several years. His wife has cancer. When Overland closed its doors, Mr. Anderson was left with a claim for unpaid wages, vacation pay, and health care benefits.

There are 350 Bob Andersons who, as former employees of Overland, have similar claims. If Overland is permitted to collect its undercharges as the Supreme Court says it not only may, but should do, its former employees will receive hundreds of thousands of dollars.

This means the Social Security Administration will collect its share in FICA taxes, and withholding taxes will be paid to the Internal Revenue Service. In other actions, like the Transcom bankruptcy in California, the employees, their pension, health and welfare fund have millions of dollars at stake, as does the government.

Let me give you another example. Overland drivers routinely stayed at the Super 8 Motel in Indianapolis. Overland owed over $10,000 to the Super 8 Motel. American Freight, another trucking company, has also declared bankruptcy, owing Super 8 Motel several thousand dollars. As a result, the Super 8 Motel has now filed a bankruptcy petition itself. If Overland is permitted to collect its un-

dercharges, not only will the Super 8 Motel be paid, but the creditors of the Super 8 Motel will also, in turn, be paid.

The impact of removing this asset from these bankruptcy estates is both complicated and far-reaching. Congress has been asked by some to change the law pertaining to tariff filing as a part of further deregulation of the trucking industry. Carriers such as Overland and their creditors have several important concerns about these changes.

The duty to file rates has always been considered by both Congress and the Supreme Court as essential to preventing price discrimination and other kinds of abuses. Because all parties, shippers and carriers, whether large or small, knew the rules and what was expected of them, the system worked well until the ICC unilaterally chose to ignore the law and set its own rules. By the ICC's own admission, it failed to enforce the law. It is this lax enforcement which led parties to ignore the filed tariff doctrine.

In June, the Supreme Court concluded that allowing shippers to pay less than the filed rate undermines the basic structure of the Interstate Commerce Act, and directly conflicts with its core purpose, that is, to ensure reasonable and nondiscriminatory pricing.

We have heard a lot this morning about the equities. Let me assure you that the equities in this case do not unilaterally favor the shippers. There is a dual duty under the law, not only to file tariffs, but also to pay the filed rate. Filing of tariffs is now permitted on one day's notice to the public. It is a simple matter for every shipper, large or small, to request a copy of the tariff when contracting for shipment.

It is the large shippers and not the small shippers who have received the lion's share of the discount. As the Supreme Court noted, and I quote, "Any shipper who has the market power to require a carrier to reduce its tariffs could also require proof from the carrier that the negotiated rates had been filed before tendering shipment, especially since there are commercial services providing up-to-the-minute details of the carrier's rate."

We would also note that these shippers could work with the carrier under the carrier's contract authority.

If the requirement to abide by filed tariffs is to be eliminated, it should be done openly and forthrightly. There is no point in requiring tariff filing under one provision of the statute when another provision allows an ad hoc, retroactive determination that payment of tariff rates may be excused. That is precisely what the proposed legislation would do. And it would result in both shippers and carriers not knowing what rate would apply.

The requirement to file and pay tariff rates is vital to the prevention of price discrimination and the efficient and orderly interstate shipment of goods. Price discrimination favors only big shippers. Unless filed rates are honored, it is almost impossible to ensure that rates are fair, reasonable, and nondiscriminatory.

The requirement to publish and pay filed rates has been the linchpin of the Interstate Commerce Act for 100 years. If you nonetheless deem it necessary to make a change, I urge you to consider the practical, legal, and economic effect on all concerned. Legislation which requires filing of tariffs but excuses payment of the

filed rate is likely to result in protracted litigation and other inefficiencies for shippers and carriers alike.

Any change should apply prospectively and not retroactively to already pending claims and bankruptcy cases. H.R. 3243 applies retroactively and would apply to cases pending in both district courts and before the ICC. Retroactive application would have devastating effects on the several thousand bankrupt trucking companies and the hundreds of thousands of creditors they represent.

In addition to the serious legal questions raised by any such retroactivity provision, every pending court case would be nullified at great cost. In Overland, this would mean that the thousands of dollars spent bringing these cases to court would have been wasted.

Any change should not mandate determination of every claim by the ICC, but preserve the separation of powers between the executive and judiciary branches of government.

And finally, we have heard a great deal about various positions on the statute of limitations provision in this law. It seems quite curious that those who are so in favor of this law would not be in favor of shortening of the statute of limitations provision. This is precisely because shippers desire to preserve the right to collect overcharges. It is the inequitable applicability of this law to overcharges and undercharges which makes it blatantly unfair. Any change to the requirement to publish and pay according to filed rates should apply equally to shippers and carriers.

A hasty attempt to enact retroactive legislation directed largely at bankrupt carriers is likely not to pass muster, and will not serve the long-term policy goals related to deregulation and the overall purposes of the Interstate Commerce Act.

Thank you.

[The statement and questions and answers follow:]

PREPARED TESTIMONY OF

JUDY L. WOODS
For

UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE & TRANSPORTATION
Surface Transportation Subcommittee

July 17, 1990

Mr. Chairman:

My name is Judy Woods. I am an attorney for the nearly 1600 unsecured creditors of Overland Express, Inc. In addition to Overland, there are some 6,500 other bankrupt carriers. Many of them were small or medium-sized businesses who found it impossible to compete when squeezed between the large national trucking companies and the large national shippers. Overland was a truckload carrier doing approximately $100 million annual business based in Indianapolis, Indiana. In 1988 Overland filed a petition for relief under Chapter 11 of the Bankruptcy Code and under the supervision of its Creditors' Committee has been liquidating its assets.

As a part of the process, Overland engaged the services of an auditor to review the freight bills of Overland for 3-1/2 years, 1985-1988. It was discovered that approximately $20 million of freight undercharges were due to Overland. While $20 million is a lot of money and vital to the unsecured creditors, it represents little more than 6% of the revenue of Overland during this time period. Of the more than 300,000 freight bills that were audited, only a fraction, or about 4.5%, were found to

contain errors, discrepancies, or improper tariff references resulting in undercharge or corrected freight bills being sent. Of the total amount of freight undercharges claimed by Overland, nearly half involve shippers who are Fortune 500 type companies. The big sophisticated shippers got the lion's share of discriminatory price discounts. Large, national trucking companies engaged in predatory pricing tactics that encouraged and favored those big shippers.

In many cases, undercharges are the only asset available to pay employees, taxes, trade creditors, and other unsecured creditors. In the bankruptcies where undercharge audits have been done, the number of undercharges represent a small fraction of the shipments which take place, whether measured by the number of shippers involved, the cost of the shipments, or the carrier's total revenue. Nevertheless, these undercharges are tremendously important to bankruptcy trustees and creditors. Abcut 20% of the undercharge claims made by Overland involved negotiated or discounted rates, the rest -- 80% -- of the undercharge claims involve rate errors, tariff interpretation, or contract issues. Negotiated rate undercharges represent only 1.1% of the value of Overland's shipments for the 3-1/2 year audit period.

UNSECURED CREDITORS

Let me introduce you to some of the people and businesses I represent:

Robert Anderson was a driver for Overland for several years. He had an outstanding safety record and was a supervisor and trainer of new student drivers. Mr. Anderson's wife has cancer. When Overland closed its doors, Mr. Anderson was left with a claim for unpaid wages, vacation pay, and health care benefits. There are 350 Bob Andersons who as former employees of Overland have similar claims. If Overland is permitted to collect these undercharges, as the Supreme Court says it not only may but should do, its former employees will be paid more than $310,000 in wages and related benefit claims. This means the Social Security Administration will collect its share in FICA taxes and withholding taxes will be paid to the Internal Revenue Service. By collecting its valid undercharges, the unsecured portion of all of Overland's employee wage and benefits claims could be paid in full.

Let me give you another example. Many Overland drivers stayed at the Super 8 Motel in Indianapolis. When Overland closed its doors, Overland owed over $10,000 to the Super 8 Motel. American Freight, another trucking company, has also declared bankruptcy, owing the Super 8 Motel several thousand dollars. The Super 8 Motel has now itself filed a bankruptcy petition because of the more than $30,000 owed to it by bankrupt trucking companies. If Overland is permitted to collect its undercharges, the Super 8 Motel could be paid and the creditors of the Super 8 Motel could also be paid.

Wayne and Marie Deaton own the Central Computer Store. Marie has objected to nearly every attorney fee application filed in the Overland case because she feels that only accountants and attorneys are being paid while creditors get nothing. There is a common misperception that only auditors and attorneys make money from bankruptcies and the collection of undercharges. Even after all the expenses, court costs, auditors, accountants and attorneys are paid, this could mean as much as $6.7 million could be collected to pay the claims of Marie Deaton and others like her. Were it not for the undercharge audit, litigation and collection efforts, nothing would go to these creditors.

As I will show, the proposed legislation will have greater social, economic and legal costs for both the government and private parties, far exceeding any costs involved in collection of undercharges. The proposal would create far more business for lawyers and accountants throughout the transportation industry since both operating and bankrupt carriers, plus shippers for both, would litigate unpublished rates. If the requirement to publish tariffs and pay the published rates is eliminated, the result will be wonton price discrimination, more bankruptcies, and a maze of legal proceedings questioning the reasonableness of every individual charge that accidentally or otherwise varied from the tariff. Neither shippers nor carriers could know in advance what rate applied to a shipment. The ICC could enforce a rate which was not the tariff rate, the agreed rate, or the accidentally billed rate. Without the stabilizing effect of

enforcement of published rates, carriers could not control their revenues and shippers could not predict their transportation costs; but lawyers and accountants would have more business.

PROPOSED LEGISLATION

Congress has been asked by some to change the law pertaining to tariff publication as a part of further deregulation of the trucking industry. A bill (H.R. 3243) has been introduced into the House. The Senate may soon be asked to consider that bill or a similar proposal to change the tariff filing requirements for motor carriers. Carriers such as Overland and their creditors have several concerns about these changes:

1. Price Discrimination -- Undercharges are property of the bankruptcy estate and are often the only asset with which to pay unsecured creditors. Depriving creditors of these assets is not an equitable solution to the morass caused by the ICC's failure to enforce the law. As the Supreme Court noted last month in *Maislin Industries v. Primary Steel*, the equities do not favor the shipper. "[A] shipper who has the market power to require a carrier to reduce [its] tariffs could also require proof from a carrier that the negotiated rates had been filed before tendering the shipment, especially since there are commercial services providing up to the minute details of the carrier's rate schedule." (Slip Op. 13, fn. 12)

By allowing shippers to claim that an unpublished discount rate should control over the published tariff rate, Congress would allow shippers like Sears, General Electric, or Johnson & Johnson to reap the benefit of an illegal bargain at the expense of Robert Anderson, the Super 8 Motel and Marie Deaton. Bob Anderson worked for Overland expecting to be paid in whole dollars. The Super 8 Motel and Marie Deaton did not agree to be paid at a discounted rate. Sears, General Electric, and Johnson & Johnson were well aware of tariff publication requirements but chose to do business with Overland on the basis of secret unpublished discount rates. This price discrimination in favor of Sears at the expense of Robert Anderson, for Johnson & Johnson at the expense of the Super 8 Motel, and for General Electric at the expense of Marie Deaton, is unjustifiable and unfair.

The duty to file rates has always been considered by both Congress and the Supreme Court as "essential to preventing price discrimination," (*Maislin* Slip Op., p. 1) stabilizing rates, and preventing other kinds of criminal activity and abuses. No defenses to payment of the tariff rate have been permitted for over 100 years. Because all parties have known the rules and what was expected of them, the system worked well until the ICC unilaterally chose to ignore the law and set its own rules. Without the requirement that rates be published and the published rate be enforced, it becomes virtually impossible to ensure that rates are reasonable and nondiscriminatory. In *Maislin*, the Supreme Court concluded that allowing carriers to pay less than

the filed rate undermines the basic structure of the Interstate Commerce Act and directly conflicts with its core purpose. (Slip Op. at p. 9)

Publication of tariffs are now permitted on one day's notice and by electronic means. It is a simple matter for every shipper, large and small, to request a copy of the tariff before contracting for shipment. Shippers who can command discounts can easily require carriers to provide proof that their rates have been published.

It is wrong and unfair to selectively change the law so that one standard applies to carriers and another to shippers. It is also wrong and unfair to retroactively put the burden of illegal negotiated rates on the Robert Andersons, the Super 8 Motels, and the Marie Deatons. If the requirement to pay the published rate is to be changed, it should be changed for all, but not retroactively.

2. Publication Without Enforcement -- If, after more than 100 years, the requirement to publish tariffs and to abide by them is to be eliminated, it should be done openly and forthrightly. There is nothing to be gained by requiring carriers to publish tariffs and then allowing shippers and carriers to agree to ship at some other secretly negotiated rate. There is no point in requiring tariff publication under one provision of the statute when another provision allows an ad hoc retroactive determination that payment of tariff rates may be

excused and no penalties may be enforced for failure to file. The filed tariff doctrine is for good reason not unique to motor carriers. It has been applied nationally and by the individual states to all types of regulated businesses -- telephone companies, electric companies, gas companies, railroads, etc. -- because it is essential to stop price discrimination that damages competition and the competitors.

3. Costs of ICC Administration -- It is important to recognize the effect of this legislation on governmental costs and the separate roles that administrative agencies and courts should play in the process. Requiring that every tariff dispute, every undercharge claim and billing error be referred to and determined by the ICC imposes an extraordinary administrative burden on the ICC and greatly increases legal fees for carriers and shippers alike. Every undercharge -- whether agreed upon or the result of mistake -- would be made into an ICC proceeding with evidentiary hearings into the subjective intentions of the parties and the reasonableness of the particular rate and bill. In addition to the budgetary burden this would impose, the ICC becomes both rulemaker and judge. This is a process which improperly invades the role of the judiciary.

4. Retroactive Change -- No change should be made to apply retroactively. H.R. 3243 applies retroactively and would apply to cases already pending in District Courts and before the ICC. Retroactive application of any change to the tariff filing

requirements would have devastating effects on several thousand bankrupt trucking companies and the hundreds of thousands of creditors of those carriers. Every pending court case would be nullified at great expense to all concerned. It would mean that the hundreds of thousands of dollars already spent by Overland to bring its cases to court and force collection would be for naught.

5. Overcharges -- Finally, any attempt to restrict the collection of freight undercharges should apply equally to the collection of overcharges. There is no legitimate reason to treat shippers and carriers differently.

What H.R. 3243 really does is preclude bankrupt carriers from collecting undercharges while permitting operating shippers to continue to collect overcharges. Every month shippers bill operating and bankrupt carriers for overcharges which far exceed the claims for undercharges made by bankrupt carriers. In the case of McLean Trucking Co., the amount of overcharges paid by the trustee exceeds the amount of undercharges collected.

If you should nonetheless deem it necessary to make a change, I urge you to consider the practical and economic effect on all concerned and to bear in mind these things:

1. The requirement to publish and pay tariff rates is vital to prevention of price discrimination and the efficient and orderly interstate shipment of goods. Price discrimination

favors only big shippers. Unless filed rates are honored, it is almost impossible to ensure that rates are fair, reasonable, and nondiscriminatory;

2. Legislation which requires publication of tariffs but excuses payment of the filed rate is likely to result in protracted litigation and other inefficiencies for shippers and carriers;

3. Any change should not mandate determination of every claim by the ICC and should preserve the separation of powers between the executive and judiciary branches of government;

4. Any change should apply prospectively and not retroactively to already pending claims and cases; and

5. Any change to the requirement to publish and pay according to filed rates should apply equally to shippers and carriers.

Thank you.

Judy L. Woods

Question by Senator Pressler:

If H.R. 3243 were enacted, what mechanism would remain for federal regulation of trucking rates?

Answer by Ms. Woods:

Although H.R. 4323 purports to be a minor adjustment to close a "loophole" in the Interstate Commerce Act, its effect will be to rend the fabric of the Act and to unravel any effective federal regulation of trucking rates. First, there will be no means to enforce the requirement that carriers publish their rates as now required by 49 U.S.C. § 10762. Even though the requirement to publish rates is not eliminated, H.R. 3243 adds a new Section (§ 11712) which creates an exception to this requirement. When read in conjunction with the proposed amendment to § 11705(b)(4)(a), the result is that the ICC may grant relief on a case-by-case basis and may determine what is "reasonable" without reference to the filed rate or the negotiated rate.

Second, because the procedure contemplated by H.R. 3243 requires a case-by-case determination, the result will always be a determination is made after the shipment has occurred as to what "reasonable" rate should apply. Even assuming the ICC can promulgate regulations controlling these fact-sensitive determinations, there will be no public notice of what rates actually apply to shipments until ICC determination. Neither the shipper, the carrier nor the public will be able to point with any certainty to any tariff or agreement and say what rate applies to a shipment. Precisely because H.R. 3243 proposes to recognize

"negotiated rates" which are not in writing, the stability and certainty of published tariffs is eliminated.

Third, H.R. 3243 eliminates the regulatory means to ensure that trucking rates are nondiscriminatory and reasonable. Because rates are not published and made available for public review, no one, not other shippers, other carriers, the ICC or the general public, will have the means to review and compare rates. Public knowledge through the existing publication and notice provisions of the Act is a primary means of promoting competition and ensuring fair, reasonable and nondiscriminatory pricing. H.R. 3243 promotes and condones secret price agreements and thereby eviscerates any effective federal regulation of trucking rates.

Question by Senator Pressler:

> What amounts are owed to employees of bankrupt carriers in back wages? What amounts are owed in local, state and federal taxes? Would it be useful to determine the amount of their back wages and tax amounts?

Answer by Ms. Woods:

In each bankruptcy, different amounts are owed for employee wages, accrued vacation and sick leave for employees, employee health care benefits, employee pension benefits, and related payroll taxes. In addition to FICA, state and federal unemployment taxes, state and federal withholding taxes, other local, state and federal taxes are owed by bankrupt carriers including fuel taxes, property taxes, income taxes, and so on. Although it

is impossible to generalize, in one case, Transcon Lines, a California-based carrier, former employees have more than $18 million in claims for back wages. Social security, unemployment and income taxes on these wage claims would equal several million more.

In each case where a trucking company has filed bankruptcy leaving local, state and federal taxes unpaid, the government loses this tax revenue unless assets are recovered which allow the bankruptcy trustee to pay them. Under the Bankruptcy Code (11 U.S.C. (507(a)), the usual priority of payment is (1) administrative expenses as allowed by the Bankruptcy Court; (2) unsecured claims for wages and unpaid leave up to $2,000 per employee; (3) unsecured claims for contributions to employee benefit plans up to $2,000 per employee (less any amounts paid under (2)); (4) unsecured claims of governmental units, usually in the nature of income, property, employment or excise taxes; and (5) general unsecured claims, including those of employees and governmental units for amounts not paid under (1)-(4). As a result, in cases where the unsecured assets are insufficient to pay 100% of all claims, as they are in almost every bankruptcy, employees and taxing authorities receive the first dollars collected from shippers for freight undercharges (after payment of administrative costs such as attorneys for the debtor and trustee, rent accrued during administration, and so on). In the case of Overland Express, collection of undercharges will enable Overland to pay <u>all</u> allowed employee wage and benefit claims up

to $2,000 per employee, all allowed tax claims, and a portion of the unsecured claims of employees, governmental units and trade creditors. Without these undercharge amounts, Overland would not be able to do this. In the Transcon bankruptcy, it is estimated 80% of the amount collected from undercharges will go to employee wage and pension contributions.

The tax and federal deficit implications of not collecting undercharges are significant. For every $100,000,000 collected and paid to employees, FICA collects $75,000, FUTA and state unemployment taxing authorities approximately $34,000. In addition, employees receiving this income pay their share of FICA, or an additional $75,000, and withholding taxes of approximately $150,000. State and local taxes collected on this amount can be estimated to be an additional $150,000 to $200,000. In other words, close to one-third of the amounts collected from illegal shipper discounts and paid to employees end up being paid to taxing authorities for the benefit of federal, state and local governments.

The ICC should be asked to contact bankrupt carriers and request them to identify the claims pending for wages, employee benefits and local, state and federal taxes. This information is readily available in the bankruptcy petitions, schedules and claims dockets prepared in these cases. This information would be particularly helpful to this Committee in assessing the true impact of this proposed legislation. By determining the amounts

of wages and benefits to be paid to former trucking company drivers and employees, as well as tax claims to be paid, this Committee would have a more accurate measure of both the economic and human cost of this legislation.

Undercharges represent a small fraction of the shipments handled by bankrupt trucking companies, but are often the only asset to pay employee wages and taxes. Undercharges are vitally important to bankruptcy trustees and are property rights which should not be stripped away merely to benefit large national and multi-national corporations who violated law at their own risk.

Question by Senator Kasten:

> After auditors, lawyers and others collect their fees, what percentage of the amount recovered from a shipper in a negotiated rate case actually goes into a carrier's bankruptcy estate?

Answer by Ms. Woods:

No answer to this question can be given which applies in every case. In every bankruptcy, the court must approve all appointments of attorneys, accountants and auditors and must approve every request for fees or compensation at both a preliminary or interim stage and at the conclusion of the case. In bankruptcy, the trustee, debtor, creditors and judge make decisions based upon economic feasibility and aim to maximize economic value for the estate. The notice and hearing provisions of the Bankruptcy Code are an important safeguard to make sure

fees are fair and that the estate and creditors get a fair return on the money spent to audit and collect undercharges.

Since 1985 when the ICC made its decision not to uphold the law and published its announcements regarding negotiated rates, shippers began litigating what had been well-settled law for nearly 100 years. As a result of the ICC's failure to enforce the law and a result of this onslaught of litigation, bankruptcy trustees and creditors' committees have had to incur significantly higher legal costs. The risk of not collecting undercharges was greatly increased by the ICC's policy and resultant litigation and therefore attorneys and auditors could demand higher fees from bankruptcy trustees.

The percentage paid to attorneys and auditors varies from case to case (generally the range is between 25 and 60%), and in some cases, attorneys such as me are paid on an hourly basis for time expended and not on a percentage basis. In every case, the estate collects money it would not otherwise have. Even after all attorneys and auditors are paid, the estate has dollars (in Overland's case this could mean millions) it would not have if the audit had not been performed and litigation had not been commenced against shippers.

This Committee should bear in mind that had the ICC not invited unwarranted litigation, these fees would have been substantially less. Nevertheless, H.R. 3243 would create an environment in which litigation over trucking rates would become

much more prevalent and carriers and shippers alike would pay more in attorneys' fees. Because the proposed amendment to (11705 invites an evidentiary determination of what is "reasonable" whenever a shipping bill varies for any reason from the published tariff or from what the shipper claims was a negotiated rate, shippers and carriers will end up going to court and going to the ICC for every discrepancy. Whether the variation in the bill is the result of simple error, failure to publish a tariff, or disagreement between shipper and carrier about what rate applies, the ICC will have to make a case-by-case determination of what rate applies. The legal costs to the parties will be great, but the administrative burden on the ICC will be astronomical.

Senator EXON. Well, I thank the panel for a very interesting discussion. And if there are more lengthy written statements, we will accept those as a part of the record, without objection, at the appropriate point in the record.

Ms. Woods, you I believe are the only witness here today, as I take it, who believes there should be no change made whatsoever, that the court ruling should stand as a guidance to interpretation before and after the fact and in the future.

So, since you are the only witness who has taken that position, I would like to give you, in all fairness, the opportunity to expand anywhere further that you would like to.

It seems to me that it is your interpretation, then, speaking from the people who were hurt because of the bankruptcy action, that you feel that the shipper and the carrier are equally liable in cases that you have referenced in your testimony. Or, to put it another way, if a carrier did fail to file as required by law, then the full assessment can and should go to the ""deep pocket" of the shipper.

I would only say that certain testimony this morning indicates to me that maybe some shippers did not know of the fact that the carrier had not filed. But would you not agree that there are many cases where the shipper did not have sufficient knowledge of the law or was an innocent bystander? And then the courts would come along for the bankrupt trucking company and say you have to pay up even though you had no knowledge of the process that should have been followed?

Ms. WOODS. Well, unfortunately, I am sure there are cases where shippers have been ignorant of the law. In our country we have never seen that as an excuse for not abiding by the law. If that were the case, the Internal Revenue Service would find it impossible to collect taxes in this country. Ignorance of the law is not an excuse.

Now certainly there are small shippers who maybe have difficulty, for one reason or another. However, we are talking about commercial businesses. We are not talking about Joe Smith on the

street, we are talking about businesses who are contracting for shipment. And it behooves them to assure themselves of what rate is to be paid for that shipment.

And this is not something new. It has been the law in the United States, in the Federal Government, and in nearly every state in this country for a long time. There are many regulated businesses of this nature, and ignorance has never been an excuse.

Let me also address the point that this is not a one-sided thing. Overland has paid overcharges for years, just as every other carrier pays overcharges. Shippers routinely bill on a monthly basis for overcharges. These are paid in the routine course of business. And in the Overland bankruptcy there are many pending claims for overcharges by shippers.

One of the real difficulties with this proposed legislative change is that it does not apply equally to the collection of overcharges and undercharges. And I would suggest to you, Mr. Chairman, that there is absolutely no legitimate reason for treating shippers and carriers differently in this respect.

Senator EXON. You all, in your testimony, seem to be critical of the past actions of the Interstate Commerce Commission, and I have alluded to the fact that evidently you feel that the actions of the previously constructed ICC and their lax attitude was a contributing factor to the problem that we are now addressing. Is that the position of all three of the witnesses?

Mr. HARKINS. Well, speaking for myself and on behalf of my carriers, I would say it was more than contributing. I would say that it was almost exclusively the reason for this problem.

Senator EXON. Well, I am glad to hear that kind of testimony. Just so the record is clear, I think that there is no one that saw the difficulties of the previously constructed ICC and the way they construed incorrectly, time after time, the intent of the Congress, and there is certainly no Member of the Congress that had more to do with forcing the restructuring over the determined opposition by the Administration. This is one place where I was able to exercise a veto, although maybe a de facto one, for the continuation of the past policies of the ICC.

Evidently, you agreed with those efforts, and as I indicated when Mr. Philbin testified earlier this morning, that I felt that we had a new day and a new dawning over there, perhaps, with regard to interpretation of the law as intended when deregulation, or partial deregulation, took place.

Let me ask Mr. Harkins and Ms. Batts, do you feel, evidently the way Ms. Woods does, I believe—well, let me ask you this question first, Ms. Woods. You do not have any objection, do you, with the new structure of the ICC and the anticipation that they are going to do a better job than was done previously?

You do not have any quarrel with the fact that if the ICC would insist and could enforce the rule where the carrier would have to make filings, and that the shipper would have to check those filings and if they did so then the shipper would not be liable, do you? In other words, you would like to leave the law just as it is now?

Ms. WOODS. Yes, that is our position: that the filed rate doctrine has worked well for a number of years, and quite honestly there

has been nothing substantiated either by the ICC previously or in the testimony that we have heard today that in any way warrants such a massive change in the whole purpose of the Interstate Commerce Act.

Senator EXON. But given that, Ms. Woods, if the intent of the law was closely followed in each and every instance and the filings were made, and those filings were verified by the shipper, then is it not true that those who have been injured that you so eloquently spoke of would—that there would be no funds, or no claims for funds to assist them, is that right?

Ms. WOODS. Well, Mr. Chairman, in these bankruptcies, had the filed rates been paid to begin with, it is quite possible that some of these companies might not have ended up in bankruptcy. I certainly cannot surmise in each and every case that that would be so, but had the filed rates been paid there would have been additional revenues available to those now-bankrupt companies.

Senator EXON. Let me ask Mr. Harkins and Ms. Batts to respond to that, if you would, along these lines. If the new ICC make-up is what we hope it is, do you feel that additional legislation as proposed in the House of Representatives, and particularly you, Mr. Harkins, that spoke in approval of that with some amendments, do you feel—what is the argument against them? The proposition of seeing if the system will not work as intended under the new ICC direction, rather than having legislation introduced?

Mr. HARKINS. Well, putting aside sections 2 and 3 of the bill, which deal with the reduction of the statute of limitations, and also a future remedy for shippers and carriers to waive undercharges and the like where tariff errors have been made, I think those speak for themselves, and they are progressive elements of the bill.

As far as the element of giving the Commission limited authority to review cases where there are claims pending against the shippers, I think—and we feel—it is fair that those claims are to be reviewed on the basis of not only what the filed rate was but also whether or not, in fact, there was a negotiated rate between the shipper and the carrier which moved the traffic, and whether or not the carrier failed to publish that rate and whether or not the shipper relied on that particular rate.

There is a question of fairness on both sides, whether or not the carrier is not getting what was due, and whether or not the shipper should pay more than he thought he should pay on the basis of the negotiated rate, and we feel that giving the Commission a reasonable time frame within which to review these cases would allow that fairness to enter into the ultimate decision.

I do not particularly like being in the situation of having to disagree with another witness, but Ms. Woods spoke of possibly, if the carriers had gotten the filed rate, they would not have gone out of business. I think that is a little bit aside from reality, because if the carriers had elected to try and charge the filed rate in those cases they probably would not have gotten the traffic.

But suffice it to say, I think there is a question of what is right on both sides of the coin, whether or not the shipper paid less than he should have, or whether or not the carrier had agreed to accept less than the filed rate, and I feel confident that with the proposal that we have, and have agreed upon with the shippers, that there

are safeguards in there which will enable the Commission to review these things on a case-by-case basis and decide and adjudicate as to what is appropriate and what is fair, and I think absent that provision, and reliance strictly on the filed-rate doctrine, that there would be a substantial amount of unfairness worked with regard to shipper interest in this particular case.

Ms. BATTS. Mr. Chairman, if I may add, certainly as we look at this, the question I think you have to ask is what was the political environment in which those rates were negotiated but not filed? Certainly, as you have indicated, the political environment at the Interstate Commerce Commission has changed, and like you, we are very heartened, in terms of the make-up of the Commission now and what we feel will happen.

What this legislation tries to do is make sure that the parties who operated in that environment have an opportunity to come together with the Commission in order to rectify that situation. But in the future, everyone understands what the rules are.

I think while Ms. Woods is very right in terms of ignorance is no excuse of the law, there certainly was a political environment that encouraged people to take that attitude, and that has now changed. The Supreme Court has changed that. In the future, we do not think we are going to have this problem. The question is, what do you do with the people who got trapped in that political environment of the past?

I think you are absolutely correct in asking, what about the people that Ms. Woods referred to? Unfortunately, given the economic environment the carriers are operating under, there will continue to be bankruptcies. There will continue to be Robert Andersons who lose their job and whose wives have cancer. It breaks my heart. But that is not the issue that we are talking about today. What we are talking about today is, how do we get from A to B, and address the new environment so that we can proceed forward?

Senator EXON. Can any of you enlighten me on the fact that crossed my mind on this whole proposition? Is it generally true that most, or a large portion of these failures by the carrier to make filings as required by law are happening to the carriers that are in deep financial trouble and headed towards bankruptcy? Do you have any personal knowledge? Are there any statistics on that?

Mr. HARKINS. I would say that the tendency for that type of pricing is more heightened with the carriers are in financial difficulty and probably eventually do go bankrupt, but I would not say that it is exclusively with them because I think many carriers recognize the spoken, if not written, policy from the Commission that simply said tariffs do not mean anything to us. We are not looking at them, so do not bother with them.

But I agree with you, Senator, that it is most prominent with respect to those carriers that are financially in difficulty and are about to go bankrupt, because those are the individuals that are trying to grasp at the last life preserver in order to stay alive another day in hopes that something will happen.

Senator EXON. Mr. Harkins, let me ask you this question: what happens to a financially sound carrier when it is discovered that they have not properly filed? Is a fine assessed and paid for by the carrier and the shipper in that event has no liability?

Mr. HARKINS. Well, this is a very substantial problem that some carriers have today, because of the fact that in the normal course of business there are mistakes made in the filing of tariffs. For example, if you file a tariff improperly and subsequently discover that you have got to go to a shipper——

Senator EXON. Well, I understand that, but in that case where the carrier fails to file, for whatever reason, does that hold harmless the shipper if the carrier is financially sound?

Mr. HARKINS. Not exactly, in my estimation. The problem is that the carrier is today required by law to collect that rate that is filed in the tariff from the shipper. If he does not do that, then he is subject to prosecution under Elkins.

Now, from a practical point of view, where the carrier made the error and he admits to the error, the logical step is to forget about it and hope that the error in the tariff never becomes a cause for action under Elkins. And that is precisely why we have added that particular section to the proposed legislation, which, under Commission review and approval, would authorize the carrier to explain to the Commission that he made a mistake and that if he abided by the mistake he would have to sue his shipper for X thousand dollars worth of undercharges.

And rather than do that, he wants the Commission to understand he made a mistake and to allow them to waive those charges. We do not have that authority today. So technically speaking, where the carrier misfiles and does not submit billing for the undercharges, he is in violation of Elkins.

Senator EXON. Well, as I referenced earlier in my days of experience in this, I suspect that with all the mistakes I made, I would have probably been in jail and not the United States Senate if we had investigated that. I think the statute of limitations has run. I would like to ask the legal people whether or not I have confessed to something. I think the statute of limitations has probably run.

Are you saying, then, Mr. Harkins, that if the carrier is financially responsible, both the carrier and the shipper are liable for either an intentional action or a mistake?

Mr. HARKINS. Well, if it turns out that both are knowingly aware of that and they do nothing about it, then technically speaking they are in violation of the law. I think things of this nature would be handled on a practical basis. For example, if the carrier realized that he was going to have to assess an undercharge billing of, say, $50,000 against a shipper for a tariff error, being a practical businessman I think he would find a way to negotiate something for the future with that shipper that would eliminate that $50,000 and make things right.

And that I think is something that is utilized today as a good business practice by shipper and carrier.

Senator EXON. Mr. Harkins, I believe that a few months ago your organization proposed some compromise legislation to address this proposition. But today you are only endorsing an 18-month solution to the problem. Are there some inconsistencies here, or have you simply changed your mind? Why did you not propose a sunset provision earlier, but are now endorsing it?

Mr. HARKINS. Earlier on the provision was open-ended in the sense that it did not have a termination date. And that was simply

because of the fact that we were trying to codify what we felt, or thought at the time, was the Commission authority as explained under the Negotiated Rates Policy. In other words, the Commission indicated that it had the authority to declare these type of actions as unreasonable practices. And we were codifying that authority, if you will, in the original legislation proposed about a year ago.

Since then, the Supreme Court has come out and said, of course, that the Commission did not and does not have that authority. So the revision to the legislation which we and the shippers are proposing here today puts an 18-month termination date on the section I provision, which allows the Commission to review these things on a reasonableness basis, is put in there because that is really only designed to deal with the problem caused by the Commission's no tariff filing policy to begin with, which has brought us here.

Secondly, it is a more than reasonable amount of time for the Commission to begin to require carriers to file their tariffs and to adhere to the filed tariffs, and for shippers to assure themselves that the tariffs that they have agreed upon with the carriers are in fact filed. Eighteen months, I think, is a more than reasonable amount of time for the transition period. And if the Commission, as it should, enforces the law of tariff filing and adherence to tariffs, this problem will not occur in the future.

Therefore, there is absolutely no need for an open-ended provision. And we feel that the Commission does not need and should not really have the authority to set aside rates in the future. It only should have that with respect to the past because they are the ones that caused the problem, and they should adjudicate these cases on a fairness basis.

That is why in the revision of the act we negotiated this termination date with respect to the Section I provision of the act only.

Senator EXON. Thank you.

Ms. Batts, I assume you and your organization take a very similar stand to what Mr. Harkins said, is that right?

Ms. BATTS. Yes, I agree with Mr. Harkins.

Senator EXON. Thank you. There may be additional questions for the record that we would appreciate your responding to as quickly as you can.

Ms. Woods, is there any final statement that you care to make?

Ms. WOODS. Yes, I would like to address a few of the points if I might, Mr. Chairman.

I would suggest that some of what we have heard indicates that we ought to give the ICC a little bit of time to review their policies and procedures and have some time to enforce the Motor Carrier Act of 1980 as Congress intended it to be so when it passed that legislation 10 years ago.

We think this is a good idea, and another reason why the Congress ought not to hastily enact legislation at this time. We also would like to suggest that in many of these cases we have heard a great deal about, well, perhaps it is the ICC's fault, maybe we ought to just let the shippers off the hook, they are really innocent parties. They thought they could bargain, and so on and so forth.

One of the things that is obscuring our analysis at this point is that we are failing to make a distinction between the carriers, the

common carrier authority, and the contract carrier authority. Behind the filed rate doctrine and the premise of maintaining common carriers is the idea that we have statutory imposition for the filed rate doctrine, that the requirement that rates be filed and adhered to is something that everyone was aware of.

Now certainly we can say that the ICC had a lax enforcement policy during this period of time, but there are a number of other voices out there who were cautioning shippers that the law was still the law. The law had not changed. And they had due notice of that and were required to abide by that.

The important thing to bear in mind here is that even though we may have millions of dollars of undercharges floating around out there, we have literally billions of dollars of shippers who paid the filed rates. Now it is not fair to go back and say we are going to let these shippers who broke the law, who entered into illegal bargains, and let them off the hook at the expense of all those other shippers that paid the filed rate.

And I would suggest that if there is genuine concern here for small business, particularly small shippers, that to allow the shippers off the hook for these undercharges now works strongly against that. And that is precisely because the undercharges are by and large given to large companies.

In the *Overland* case we have nearly half of the "Fortune" 500 companies represented. They make up over half of the undercharges in the *Overland* case. That is not an atypical situation. It is the large shippers that got these discounts. It is the large shippers that are now attempting to take advantage of this at the expense of the small shipper who usually paid the filed rate.

Senator EXON. Thank you very much. It was very interesting testimony. We appreciate it a great deal.

And with that, we are adjourned.

[Whereupon, at 11:45 a.m., the hearing was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT FOR THE RECORD OF
JOSEPH CANNY
DEPUTY ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS
U.S. DEPARTMENT OF TRANSPORTATION
BEFORE THE SUBCOMMITTEE ON SURFACE TRANSPORTATION
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE
REGARDING NEGOTIATED RATES
JULY 17, 1990

Introduction

Good morning, Mr. Chairman, and Members of the Committee. Thank you for inviting me here today to discuss the Department of Transportation's views regarding the "shipper undercharge" issue. Ten years after the substantial reforms of the Motor Carrier Act of 1980, much has been learned and much has been gained. One thing we have learned in the past year is that, had we achieved more complete economic deregulation of the trucking industry in 1980, this hearing would not be necessary in 1990.

Statement of the Problem

Partial deregulation has encouraged shippers and carriers to negotiate rates, in many cases in the form of discounts from tariff rates on file with the Interstate Commerce Commission (ICC). The negotiation of prices between buyer and seller is a common business practice for most industries, and we see no good reason, from a public policy perspective, why it should not be permitted in the trucking industry as well.

For the past several years, shippers have been besieged by undercharge claims and related court collection cases. These matters have arisen primarily from motor carrier bankruptcies and financial reorganization proceedings.

In a typical case, the motor carrier has negotiated a rate with the shipper, agreed to it either in writing or orally,

and then filed the rate with the ICC either incorrectly or not at all. Such a negotiated discount rate is only legal if it is filed with the ICC. Common carrier truckers must still file all their tariffs with the ICC, although contract carriers have been exempt from this requirement since 1983, and, of course, all domestic air cargo shipments have been exempt from any such requirements since 1979.

If the discounting carrier subsequently goes out of business, the shipper may be sued by a collection agent. Trustees for some bankrupt carriers, attempting to maximize the assets to be distributed to the stockholders and creditors, have sold the carriers' old accounts receivable to auditors and collection agencies, who compare the freight charges paid with the actual tariffs on file at the ICC and in effect on the date of the shipment. If the charge on the bill is a discounted rate not on file, the auditor sends a bill to the shipper for the balance due, the "undercharge." Shipper representatives have estimated that about $100-200 million in undercharges are at stake.

Efforts to Solve the Problem

Should a shipper fail to pay these undercharges, the trustee or auditor may take the shipper to court to collect the difference between the filed rate and what was actually paid. In some cases, the courts have asked the ICC for its advice on what is the lawful rate. Applying its Negotiated Rates Policy the Commission would find that a carrier had engaged in an unreasonable practice if the facts showed that the shipper and carrier had negotiated a rate, the shipper reasonably relied on that rate, the negotiated rate was billed and payment at that rate was accepted, and the carrier willfully or otherwise failed to file the negotiated rate.

The Supreme Court, in its June 21, 1990 decision in Maislin Industries v. Primary Steel, overturned the Commission's Negotiated Rates Policy. It found that the underlying purpose of the Interstate Commerce Act requires that a motor common carrier publish its rates in a tariff filed with the Commission. The Court has consistently held that this statutory requirement, referred to as the "filed rate doctrine," forbids equitable defenses to the collection of the filed tariff. Moreover, it found that the Commission had not established that the failure to file the negotiated rate was an unreasonable practice which justified a deviation from the filed rate doctrine. Finally, the Court noted that the Motor Carrier Act of 1980 did not alter this statutory requirement. It observed that "Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme...and did not see fit to change it..." Therefore, a legislative change is necessary to eliminate this archaic and obsolete requirement.

Last year a proposed legislative solution to the undercharge problem was agreed to by certain shipper and motor carrier groups. It was proposed that courts would refer undercharge cases to the ICC for its assessment as to the reasonableness of the practices at issue. This was acceptable to shippers and carriers because of the Negotiated Rates Policy that was in effect at the time. It is our understanding that these groups have revisited the issue and have proposed changes to that proposal in order to address the Supreme Court's ruling. As we understand it, this proposal would allow the ICC to review such cases and find that a failure to file a negotiated rate is an unreasonable practice and thus would constitute a defense to the filed rate doctrine. However, it

would not address the cause of the problem.

Causes of the Problem

"Truck deregulation" has been extremely successful in providing benefits to shippers, as well as to the overall economy. Consequently, it is not surprising that it has been one of the more popular economic reforms of recent decades. Nevertheless, we should bear in mind that what actually occurred in 1980 was not total "deregulation."

For example, while entry into the trucking industry was made somewhat easier by the MCA, motor common carriers must still acquire certificates from the ICC in order to operate. In addition, although there is now increased rate competition in response to market forces, collective ratemaking still exists. Moreover, motor common carriers must still file their rates at the ICC, even when those rates are independently set. These are just a few of the more significant statutory requirements that continue to apply to interstate trucking.

Many of the reforms that this Committee examined in 1980 remain on the agenda in 1990. The "shipper undercharge" issue relates in a very direct way to one of these key issues: the requirement that interstate motor common carriers file their tariffs at the ICC. In addition, these carriers must also -- as the Supreme Court recently reiterated in Maislin -- adhere to the exact letter of their tariffs even where the shipper and carrier have agreed to a different rate. However, if the tariff filing requirement and the requirement to adhere to the tariffs as filed were to be abolished, the shipper undercharge problem would disappear.

Imagine for a moment that auto prices had to be filed at a federal agency by dealerships across the nation. Negotiations take place between you and the salesman; the manager approves a discount price, and a deal is struck -- except that two or three years later, the dealership comes to collect the difference between the price you paid and the filed price. And to top it all off, the courts agree that you have to pay.

Is this the way to do business in any industry? We see no reason why the trucking industry should be treated any differently from most other industries with respect to the validity of business contracts.

Proper Context for Solving the Problem

We would prefer to deal with the shipper undercharge problem in the context of additional deregulation of the motor carrier industry, as set forth in the ICC sunset bill which, because it eliminates tariff filing, would also solve the undercharge problem. However, we recognize that shippers face an immediate problem because of the Supreme Court's ruling.

We have had only a few days to review the proposal recently agreed to by the American Trucking Association and the NIT League. This legislation appears to be a workable solution to the accumulated undercharge cases in light of the Court's decision in Maislin. However, we cannot support this approach unless it includes a long term solution to the underlying problem.

On a technical level, based on our preliminary review, we believe that several modifications are needed. First, the Supreme Court in Maislin did not reach the issue of whether an unreasonable practice justifies a departure from the filed rate doctrine. The ATA/NITL proposal does not specifically address

this issue, but states that in certain situations the Commission may find an unreasonable practice. Therefore, we suggest that proposed section 11705(b)(4)(a) specifically state that an unreasonable practice in these types of situations justifies a departure from the filed rate doctrine. We suggest the following language:

> If the Commission determines that collection of the additional amount is an unreasonable practice, the originally billed and collected charge shall be the lawful rate even though it was not filed with the Commission as required under sections 10761 and 10762.

Second, the proposal creates another hurdle for shippers. It requires the Commission to determine that a grant of relief would not "authorize an intentional violation of antirebating provisions of this subtitle nor result in unreasonable discrimination." It is our understanding that the reference to the antirebating sections are to the provisions of the Elkins Act which are contained in 49 U.S.C. §§ 11901, 11902, 11903, and 11914. We do not believe this requirement is either necessary or desirable in today's business environment. If the requirement is retained, the specific statutory sections should be listed to eliminate any doubt as to what antirebating provisions are included.

However, more fundamentally, we question the validity of this provision, which we believe could make it difficult for shippers to obtain relief. Would the shipper have to present specific evidence showing that it had no knowledge that the negotiated rate was not filed with the Commission; would the shipper have to establish that the motor carrier did not knowingly charge less than the filed rate; and would the shipper have to affirmatively show that no other similarly situated shipper received

transportation at a higher rate? As you can see, this requirement could expand what has been a relatively straightforward ICC proceeding on whether there was a negotiated rate into an extended unreasonable discrimination and antirebating proceeding.

Third, we do not believe that the section 4(b) 18-month limitation period on the relief provided by this proposal is warranted. The injustice of a carrier agreeing and accepting payment of a rate lower than the filed tariff rate, then subsequently filing a claim for payment of an undercharge, does not disappear after eighteen months.

We do not believe the filed rate doctrine is compatible with either a modern, efficient transportation system or the way shippers must conduct their business in a competitive global economy. Perhaps it was a reasonable way to operate in the early part of twentieth century, but with thousands of competitors and millions of rates and complicated tariffs, there is no practical way for even sophisticated shippers to protect themselves from the undercharge problem, as long as the filed tariff doctrine is given the judicial weight it was accorded in Maislin. Shippers will once again be ensnared in the regulatory web of the filed rate doctrine, necessitating Congressional action once again. Therefore, this relief should continue until Congress addresses the broader solution of motor carrier deregulation.

We believe the compromise approach constitutes a band aid, where major surgery is needed.

Thus, we urge you to modernize the tariff filing requirement, in the light of today's fast-paced international economy. One option that falls short of total deregulation would be to

eliminate the requirement that motor common carriers file their tariffs with the Commission. Rates that result from negotiations between a shipper and a common carrier could be specifically exempt from tariff filing requirements. However, the tariff filing requirement should not be eliminated for motor common carrier rates that are collectively set pursuant to section 10706. As long as rate bureaus continue to have antitrust immunity, the collectively set rates should be filed with the ICC and subject to their scrutiny. However, it should be made clear that carriers and shippers have the right to negotiate whatever rates are mutually agreeable.

Conclusion

We believe the shipper undercharge problem should be addressed, in the interest of sound public policy, good business practice, and fairness to shippers and carriers. However, the general approach of both H.R. 3243 and the new proposal constitutes only a stopgap solution. The Administration would prefer a permanent solution: the elimination of tariff filing requirements for independently-set rates.

If you determine a legislative solution involving changes to the tariff filing requirement is warranted, we would be happy to work with you in drafting the appropriate language.

WRITTEN STATEMENT OF

TWIN MODAL, INC.

The Motor Carrier Act of 1980 (MCA) significantly deregulated the interstate motor carrier industry. Entry restrictions were eased enhancing competition and the Interstate Commerce Commission (ICC) encouraged innovation in pricing and service options.

Estimates of the success of this partial deregulation of motor carriers include annual reductions of $60 billion in the nations distribution costs. Shippers and receivers of freight enjoy a large base of carriers offering competitive advantages in services and cost. JIT (Just in time) delivery programs, unheard of before 1980, have allowed American manufacturers to reduce inventory levels, enhancing their productivity and allowing them to compete globally while expanding domestic markets. A vibrant brokerage industry was born that brings the benefits of deregulation to even the smallest shippers. These small businesses enjoy reduced freight costs and improved services solely because of the brokerage industry.

During the past decade the ICC did not enforce some of the regulations that remained on the books following MCA. One of these was the Filed Rate Doctrine which is the subject of this hearing. Common carriers of less than truckload (LTL) freight obtained contract carrier authority from the ICC. These carriers, encouraged by the MCA and the ICC, offered discounts off of filed tariff rates either utilizing contracts or promises to file offered discounts in tariffs at the ICC. As a practical matter the shippers who accepted these discounts relied on the representations made by the carrier

that the rates he would be billed, that he would pay, and that the carriers would accept payment on, were legal and lawful rates. Following the business failure of the carrier, auditors, working for the trustee in bankruptcy in most cases, found that the carrier did not properly file the discounts with the ICC or have a "valid" contract with the shipper in question. Balance due bills for the difference between the rates offered and collected and those properly on file at the ICC were issued.

Truckload carriers, many of whom were small businesses who entered the market after MCA, marketed themselves as contract carriers even though they held a common carrier certificate in addition to a contract carrier permit. With concerns about financing arrangements, the many safety regulations at the Federal and State levels, insurance cost and availability, driver recruitment and training, and the taxes imposed by each state they operated in, they found little if any need to make sure the contracts they entered into were written to the strict format provided by the ICC. Many of these carriers also incurred business failures for numerous reasons, all unrelated to rate levels. The freight bill auditors visiting the bills of these failed carriers noted the technical flaws in the written contract and have used these flaws to convert contract carriage to common carriage subject to the Filed Rate Doctrine. Even though the service was marketed, sold, and performed as contract carriage the auditors are making claims for much higher tariff rates, citing the technical flaws in the contract as the reason for this retroactive conversion of the agreement for

providing contract carriage to common carriage.

The big lie in the Maislin decision is that the Filed Rate Doctrine prevents "rate discrimination" in the marketplace. No one needs to convince me that in the 19th century environment in which the doctrine was created it perhaps served that purpose. When I entered the freight business almost 20 years ago there was, in fact rate discrimination. The largest shippers were able to negotiate lower, specific commodity rates published in a carriers private tariff. Shippers in small communities were forced to pay higher than tariff rates through "arbitrary" charges published in tariffs. In today's environment of high speed data and voice communication, however, there is no need to have "filed" rates to protect a shipper, or class of shippers, or to protect the financial interest of a carrier serving smaller communities. With brokers serving the transportation needs of small to medium size shippers, and the brokers knowledge of market pricing for needed services, even the smallest of shippers is assured that they are paying competitive prices for competitive services. In fact, there is no evidence in any of the cases I have reviewed that any shipper received any unfair advantage over it's competitors by negotiating reduced freight rates.

Finally, we need to address the issue of inconsistent enforcement of the Filed Rate Doctrine. It is not the ICC, but independent freight bill auditors, their counsel, and trustees in bankruptcy who are trying to enforce it. If Maislin is allowed to stand, and this

Congress intends to keep the Filed Rate Doctrine, then give the ICC the resources needed to enforce it. By accepting less than the filed rate, carriers, and the shippers paying those rates, are in violation of the Elkins Act. Why has no one been prosecuted? And what of the auditors, their attorneys, and the trustees in bankruptcy who have settled some of these claims for less than the full amount. They too are in violation of the Filed Rate Doctrine and the Elkins Act. If Maislin stands than all of these should be prosecuted.

I think the practical implications of this suggestion demonstrate the absurdity of the Filed Rate Doctrine in the transportation marketplace today.

Twin Modal, Inc. is a thriving, employee owned, ICC licensed property broker. Our company was founded in 1975 and served 1,525 clients during our most recent fiscal year from offices in seven states. Utilizing contract motor carriers for most of our services, we entered into written contracts with these carriers that were prepared and reviewed by legal counsel. These contracts are being challenged, not as valid contracts, but as valid ICC contract motor carrier contracts. If these challenges are successful and the Filed Rate Doctrine is imposed completely, our company faces potential claims of millions of dollars. Unable to afford these claims we will have to cease operations. More than sixty employees will face unemployment and loss of their retirement benefits in our Employee Stock Ownership Plan. The Filed Rate Doctrine may be the

law, may in fact be the core of the Interstate Commerce Act, but imposed in these cases, is certainly unfair to the clients of Twin Modal, its employees and their families.

In my opinion it was Congress' intent to create an open, competitive marketplace in transportation. Congress recognized that we are in a global market. For American manufacturers to compete successfully they require a transportation industry that is flexible in pricing and service options. Since MCA American businesses have enjoyed just such an industry.

With the Maislin decision the Supreme Court clearly pointed out that the Filed Rate Doctrine is inconsistent with the intent of Congress in 1980. I agree.

Through immediate legislation upholding the Negotiated Rates Doctrine adopted by the ICC, overturning the Maislin decision, Congress can send a clear message to the transportation industry. The message is that this country will remain competitive in the global market place because of a healthy, competitive trucking industry that is not burdened with the need to file freight rates before moving a shippers goods.

I urge you to enact such legislation now.

STATEMENT OF VIRGINIA HIWAY, INC.

I am David E. Gee, President of Virginia Hiway, Inc. headquartered at 2734 Cofer Rd Richmond, Va. Our telephone number is 804 231 6209. Our company was started in June of 1977 as an agent for a large special commodity division carrier. In 1983 we made application and received our brokerage license. We presently arrange transportation on over 10,000 shipments per year, with offices in Richmond and Norfolk, Va. and Charleston, S.C.

Our company has always enjoyed the highest Dun & Bradstreet rating possible, which is 1A1. We have had the same surety bond since 1983, and this bond has never been so much as inquired upon.

The 1980 Motor Carrier Act meant that we no longer had the awkward task of providing hauling capacity for our shippers through trip leasing under the authority of our major carrier. Not only did we inspect the equipment we leased, but also made out long contracts, cut carrier bills, issued carrier advance drafts, required copies of driver logs, and provided other legal and carrier control documents for the spot leasing of our equipment. Usually the owner operator, or fleet driver would literally leave the scene where our load was picking up, drive some 125-175 miles back to our office, get his proper documentation, then drive back to the point of loading. All of this created much duplicity, wasted fuel, wasted manpower, lost productivity, frustration and aggravation. We welcomed the ease of entry created by the 1980 Motor Carrier Act, and quickly aligned our company to take advantage of the changes. Our business, as well of many of our small shipper's business has benefited from the betterment of the Act.

One area of the Motor Carrier Act that had seemingly been the intent of Congress, but yet, not written in language that is clear is the matter dealing with rates, and the application of the filed rate

doctrine.

The Act appeared to be written and structured to allow for the most efficient transportation services possible, eliminating fuel and driver productivity wastes.

The intent of the Act, and our most respected Interstate Commerce Commission strongly supported the foundation for a reasonable negotiated rate policy for the economies and efficiencies of the market place. In fact the Commission verbally and in written policy took the position that it was an unfair practice for agreed rates to be changed after responsible parties lent themselves to the original agreement. The recent Supreme Court decision in the Maislin case is contrary to and counterproductive to the recent Commission interuptations and the intent of the original Act. We strongly encourage quick decisive action that will remove all ambiquity.

Our company has suffered the direct expense of litigation, preparation of, documentation, and the time consuming effort of the dilemma of the issue. In our first case in 1984, we sent a common carrier copies of rates to be published, received confirmation from them that they were published, paid them the agreed tariff rates which we felt was in place, and eliminated several thousand empty miles per month. In 1987, after the company was sold, the departing traffic manager of the defunct carrier sold the freight bills to an auditing firm. This firm, audited the bills, found the tariff was not timely filed as agreed to, and sent my company balance dues on many transactions. This proved to be an embarrassment to the previous officers of the company that we dealt with. The actions of this traffic manager brought many other balance due problems to previous customers of the company. They offered to buy

the bills back at considerably more money than the auditing company paid, but their offer was refused. We settled this case out of court, and the officers of the trucking company paid 1/2 of the settlement claim.

We have had other balance due problems, and presently have some in litigation, pending H.R 3243 action, and several others that will go to litigation if clairification of the Committee is not rendered. One case involves an auditing company that has reviewed the freight bills of a carrier that had both contract and common carrier authority. The auditor claims that the contract we had did not meet the letter of the law, and consequently the higher class rates under the carriers' common carrier authority should apply. There is no question that they will legally pursue this now with all vengeance, since the rates are 250 to 300% higher than the rates that were agreed to, invoiced, and paid to the carrier over 3 years ago. The Supreme Court's decision assures an avalanche of legal actions!

What was the intent of the lawmakers that designed and voted on the 1980 Motor Carier Act?
What is the present climate?
Do we want to go back to days of stringent control?
Do we want to tell a company to "dead head" their trucks upwards of 2,000 miles because they have the wrong type of authority, or because they do not have a fax machine to instantly transmit a contract?
Do we want to tempt people to "set up" shippers and perpetrate fraud because of the filed rate policy?
Do we want to tie up our judicial system with millions of dollars worth of cases on this issue that primarily benefits a party that has nothing

to do with the original transaction?
Do we want our American manufactures to be at a disadvantage with their foreign neighbors?

We need immediate legislation that would relieve the Maislin decision. We also need affirmation that would clearly allow two responsible parties to make a market place decision that is supply/demand related. The law should not allow a third party to bring action! The law should not have a statue that allows up to five years for one grieved party to take action against the other. The law should be clearly written so that the enforcing body, the Interstate Commerce Commission does not have to guess at Congressional intent, but rather to have the statues written concisely.

A lack of action will seriously jeopardize the foundation of a free market economy in our brokerage business. No longer can we be the champion of a small shipper, or a small family truck line. Instead, our 1150 motor carrier base, our 250 member customer base, and the number of succesful market place transactions would have the constant threat of outside interferances.

On behalf of our employees, our customers, our carriers, our lower courts, our previous I.C.C. Chairman, and the market place, I encourage swift, quick and precise legislative action to correct the ommissions of a previous bill.

WRITTEN STATEMENT OF

GSA INTERNATIONAL LTD.

My name is Gregory Stachura and I am President of GSA International Ltd. which is an I.C.C. licensed property brokerage, (established in 1983,) engaged in the business of "arranging transportation for compensation" as the I.C.C. has authorized.

I am also the immediate past president of the Transportation Brokers Conference of America which you may know as the non-profit trade association which represents the brokerage industry.

Personally, I have had nearly twenty years experience in transportation having worked for both motor carriers and shippers in several capacities dealing with motor truck transportation.

The issue of negotiated rates in the motor carrier industry is representative of the difficulties faced when change is introduced in the marketplace. While certain parties in the transportation industry have seized the opportunities provided by Congress in the Motor Carrier Act of 1980 and have exercised the freedoms given to them by the Act to bring tremendous improvements in real productivity to the motor carrier industry, others continue the call for a return to the highly structured and regulated market of yesteryear.

My colleagues in the industry have no doubt, recapped the history of regulation in the motor carrier industry and I do not wish to be redundant. Suffice it to say that service and price

have never been of greater value in the motor carrier industry than they have been since the motor carrier Act of 1980. Indeed it is true that some companies have not survived deregulation while others have grown and prospered. That has been true in other industries as well including automotive, retailing, manufacturing, etc.

The negotiated rates issue involves a strict interpretation of an archaic statute which was a bonafide oversight when Congress passed the Motor Carrier Act of 1980 to breathe vigorous competition into a lethargic trucking industry. That archaic statute is popularly known as the "filed rate doctrine" and the oversight of congress in not repealing that statute has visited a serious dilema on those involved in the business of moving goods in the marketplace.

We all understand the mechanics of the problem which involves negligence in some cases; misrepresentation or fraud in others. Simply stated, motor carriers agreed to provide transportation at a negotiated price and did so subsequently billing and collecting that price. Later, those carriers, (or their agents authorized in bankruptcy or liquidation proceedings) sought to collect the difference between the agreed upon, collected charges and the filed rates which may or may not have ever effectively attracted business in the competitive markets.

No other industry conducts itself by such dishonorable practices. Such practices should not be allowed in the motor carrier industry!

The intent of Congress was expressly stated to promote competitive and efficient transportation services. The spirit is clear and yet, by oversight, the letter of the law is an impediment to the fulfillment of that spirit. This sometimes happens in governments. But when such oversights visit injustice on innocent parties in the most harsh manner, a moral and honorable government must intercede to provide relief. Such is the case in the negotiated rates issue.

Further, the government itself suffers some culpability in this matter because the government's own agency, the I.C.C. was charged with responsibility for overview, and although the commission was well aware of the practices in the marketplace, the I.C.C. did not sound the alarm, nor did it intervene to stop practices which may have conflicted with statute. Yet all the while shippers, carriers, and brokers relied on the guidance of the I.C.C.

H.R. 3243 attempts to resolve the issue of negotiated rates, yet it's present language may not do the job, either cleanly, or for the long term. H.R. 3243 could however, be amended to provide a vehicle by which Congress can bring swift relief to those earnest

and innocent parties suffering under the Supreme Court's Maislin decision.

Congress should be mindful of the fact that the I.C.C. is grossly underfunded and understaffed to the point that only the most cursory and superficial performance can be reasonably expected. Before the Congress sends the tens of thousands of negotiated rates disputes to the commission, Congress should consider the practicality of that direction. Layering administrative arbitration into the activities of the transportation industry flies in the face of the original congressional intent to promote competitive and efficient transportation services. Perhaps the success of the free market since 1980 will provide the encouragement that congress may need to pursue a comprehensive review to identify not only the filed rate doctrine but any other "gray areas" which impede further progress in the transportation marketplace.

WRITTEN TESTIMONY
of
Nancy L. McCaslin dba FRATECO

Nancy L. McCaslin dba FRATECO is an ICC licensed Property Broker, domiciled at 8170 Rolling Hills Drive, Bozeman MT., having operated as such since 1986, providing transportation services as an intermediary between shipper and carrier. As such, undercharge claims have plagued us since the onset.

With regard to the effects of the recent Supreme Court decision relative to Maislin Industries, U.S., Inc. v. Primary Steel, Inc., FRATECO, as well as the entire brokerage industry has been dealt a blow from which we may never recover unless immediate attention is given to legislation overturning the Maislin decision while at the same time affirming the primary jurisdiction of the ICC in settling "negotiated" vs. "filed" rates claims, and the urgency of this problem dictates that legislation be passed in this congress.

Previous to the Motor Carrier Act of 1980, there were few transportation brokers in interstate commerce. Today there are over 6000 licensed brokers, and their rapid growth is testimony to the valuable services that they contribute to freight transportation. Without legislative relief, those services can no longer be provided, thus affecting the broker, the shipper and the broker. We must have your support in alleviating a situation which carries an impact that could be devastating to the entire industry as well a the economic base of every marketplace. This decision is certainly not specific to the brokerage industry, but to <u>all</u> shippers.

FRATECO presently has an undercharge claim pending with Atlantis Express. As is the case with previous claims we have had, the negotiated rates were agreed to by both parties, written confirmation was sent to the carrier, FRATECO was billed by the carrier according to that confirmation, FRATECO <u>paid</u> the carrier on the negotiated amount, and the carrier <u>accepted</u> payment for the negotiated rate. Then years later, the carrier comes back with a balance due billing on transportation services which were provided to us under a bilateral contract specific to their contract carrier operating authority. And those actions are sanctioned by law. It is time to change that!!! The regulations forced upon us by the recent supreme court decision do not serve the public interest, but rather protect special interest groups from competition in the marketplace.

If legislative changes are not made relative to this Supreme Court decision upholding the filed rate doctrine vs. the negotiated rate issue, many, many reputable, conscientious brokers will be put out of business, carriers nor shippers will be able to take advantage of their services, and the entire United States economy will be impacted as the consumer will be left to absorb the costs which will result from the Maislin decision as it exists today. Where is the reasonableness of the rates?

Unreasonable rates are a very real issue in the very specialized marketplace wherein FRATECO operates. To force us into paying a rate that is in excess of 38% of our negotiated rates, as per our Atlantis Express claim, affects our total industry in a very negative manner; it drives FRATECO out of business; it affects the economics of every shipper within our marketplace; and it robs both shippers and carriers of the tremendous services provided by property brokers. That is impact!!!

STATEMENT OF ALLEN LUND

I am Allen Lund, My company is the Allen Lund Company. We broker truck transportation. We handle "general commodities", meaning a wide range of commodities.

I started the company in 1976. We have grown to include nine offices, across the country, employing more than 50 people. We now broker about 25,000 trucks per year, with gross revenues in excess of 35 million dollars. We have become one of the larger brokers in the trucking field, though not the largest.

Our company started operations in an area exempt from federal regulations: truck transportation of fresh fruits and vegetables. We expanded into regulated trucking after 1980. The Motor Carrier Act of 1980 made this expansion possible.

I want to explain briefly how the Motor Carrier Act made expansion of our service possible. If you see why we could expand useful services in a freer market, you will see more clearly how the filed rate doctrine is out of date and harms companies like mine.

Our company was able to expand into regulated trucking because

> ease of entry in trucking increased the supply of truckers and increased competition among them for freight;
>
> the expansion of contract carriage, along with the increase in carrier competition generally, made carrier prices flexibly responsive to the market; and

> the Commission recognized the nature of brokerage, and allowed regulated brokers much of the flexibility of operation which we had in the unregulated sector.

These changes also increased competitiveness and efficiency in regulated trucking. However, the Motor Carrier Act was not a complete charter of freedom. It left on the books a number of regulatory relics. The tariff system in general, and the filed rate doctrine in particular, are among these relics. These anachronisms threaten my company, hundreds of other brokers, and thousands of shippers in the U.S.

The legislative proposal before you permits the commission to approve negotiated rates which vary from tariffs, on a case by case basis. Allowing administrative exceptions from tariffs is vastly better than the law as laid down in the Maislin case. As a practical matter it would eventually stop carriers and collection agents trying to collect higher rates than they quote shippers and brokers. The collection agents, bankruptcy trustees and carriers would learn that they would probably lose a challenge in the courts or the Interstate Commerce Commission. Then they would stop trying to collect rates higher than those quoted their buyers.

Congress could solve the problem more cleanly by simply doing away with the requirement that common carriers file binding tariffs with the commission. I know H.R. 3243 does not propose this. However, if you see why binding tariff filings are unnecessary in the first place, you will clearly see why you should, at least, provide for administrative exceptions from them.

The history of transportation regulation teaches that when Congress enacted tariff filing requirements, early in the 1900s, it believed it needed an administrative agency to keep railroad rates at reasonable levels. At that time Congress also believed that it needed an agency to prevent rail common carriers from giving much better rates to some shippers than others. Congress carried this system over to motor carriers when it imposed the railroad regulatory system on them in 1935.

The Motor Carrier Act of 1980 presumed that increasing competition among carriers would do more to keep carrier rates at reasonable levels than did agency controls. The logic of the Act leads to the conclusion that such competition will do more to prevent some shippers being disadvantaged vis-a-vis others than did agency controls.

I know from experience that this presumption and this logic are valid. Competition among truckers transporting agricultural goods produced much better rates and service than the regulated truckers provided over the entire 1935 - 1980 period. I knew it from personal experience in the 1960s and 1970s. Studies by the Agriculture Department attested to this. After the MCA of 1980, rates and service in the regulated service improved greatly. Today, competition keeps truck rates close to the minimum necessary costs of service. Competition also keeps truck service near the maximum the customer is willing to pay for.

Close competition between truckers also prevents carriers favoring one shipper over another without a good cost justification. Suppose a carrier attempts to give one shipper a much better deal than another, without cost justification. This just creates an opportunity for a competitive carrier. The competitive carrier will offer that shipper better rates or

better service, or both. I understand from the academics that this is a good price theory. I know from a lifetime of experience that this is the way the truck market actually works. We see it every day.

Tariff filings with the Commission are irrelevant in today's transportation market. They were designed to permit the Commission to perform a service it no longer needs to perform, and cannot perform as well as the competitive truck market.

What price quote do the people in the truck market think is important to their business transactions? Obviously, the important price quote is the price which the carrier offers and the shipper or broker accepts, at the time of the transportation transaction. The price which the supplier and buyer agree upon in making their deal is the governing price in virtually all other lines of business. Everyone in business understands that, and most consumers as well.

This understanding is deeply ingrained. We all feel outraged when a seller quotes us one price and then tries to collect a higher price. We call it fraud. In some circumstances that practice could get you jailed, or heavily fined. Shippers and brokers feel just as strongly about this as most Americans.

We have reason to feel strongly. A broker works on a small margin -- usually 10% or less of the freight bill. If a carrier tries to collect a rate of 10% or more higher than we agreed upon and relied upon, he wipes out our profit on the transaction. If this happens often, we must either raise our margin, making trucking more costly, or go out of business.

Further, we abhor seeing the force of the law put behind fraudulent conduct. When this happens, you know the law is wrong, and must be changed.

The "filed rate doctrine" is just one of the regulatory relics which Congress left in the law in 1980. There are many regulatory authorities left to be misused. For example, some carriers are trying to get the Commission to set a floor under their rates, above competitive market levels. I cannot begin to tell you in a few words how wrongheaded this proposal is. Some carriers constantly try to get the Interstate Commerce Commission to hamstring and hogtie brokers. Some of these carriers may not understand how to function in an ordinary competitive market. Others, we think, want to eliminate the competitive thrust we put into the market.

This is our recommendation. If you can quickly eliminate this "filed rate doctrine" throwback to an obsolete era, do so. If you cannot or do not act quickly, you in Congress should use the additional time to give the MCA a good, t. orough purge of obsolete regulatory authorities and doctrines, from the ground up.

34-255 - 90 - 6

STATEMENT OF

FRED M. BRODY

PRESIDENT OF FRED M. BRODY & ASSOCIATES, INC.

I am Fred M. Brody, President of Fred M. Brody & Associates, Inc., Westfield, New Jersey. My company began operating as a freight brokerage firm in June of 1984. I employ 4 full time operating people and have 7 commission sales people.

Our operation is designed to handle LTL (less truckload) quantities, however, we also place full truckloads. We concentrate on LTL because, 1.) the shipper and carrier need our help in coordinating, and 2.) the truckload rates are so depressed coming out of our region that it is the only freight many carriers want to haul. All freight we move is put out for bid to get the most competitive price and performance combination from the carrier base we use; well over 100 carriers.

Just as we bid all moves with potential carriers, so do the shippers that call our office. Before most shippers move their freight nowadays, they try to find the lowest possible rate. This sometimes creates a false demand for equipment because after we negotiate with the carrier, we call the shipper back with a price and find out that the freight has moved already. We do not force any carrier to accept less than what they need to cover their costs and make a profit.

I am very fortunate to have been given an opportunity to develop a new business from the new industry created from the partial deregulation of the trucking industry with the passage of the Motor Carrier Act of 1980. I am fulfilling the American dream of free enterprise, entrepreneurship, and capitalism that our Country is founded upon. To make sure I was doing the proper and ethical things, I spent time in Washington, D.C., to get a better feel for how the ICC and other government agencies were guiding this newly founded industry. With some of the ineffi-

cient barriers to business taken away, there was more freedom to run a more efficient business and help bring economies to most shippers and carriers.

Now, after a lot of hard work, I found that the Supreme Court's decision to uphold the filed-rate doctrine means that the transportation industry had been misguided and rewards have been granted to carriers that have violated their tariff regulations.

For example, I have been hit with a balance due claim from Roseway, Inc., Des Moines, IA., for $10,620.75. This represents only 8 shipments that we placed with this carrier during 1988. We handled these shipments the same way as I previously described. A shipment of 1 case weighing 3500 pounds was moved at a negotiated rate of $400.00. The balance due is $3000.00. The shipper never would have agreed to pay anywhere near $3400.00 and we never would have made the move. Other carriers we called for this move wanted the same price, but had no equipment in position. I did not hold a gun to the head of the Roseway owners to force them to take this shipment for $400.00. That was the price they quoted and I paid. I am sure Roseway had other freight on that truck before it left our region besides our 3500 pound crate of machinery. Am I the only one that has to pay for the truckload or do the other shippers on that truck also have to pay the truckload rate, too?

To alleviate the major problems created by the Supreme Court's Maislin decision, we need the Congress to pass legislation that will reverse Maislin and find the collection of additional tariff rates to be an unreasonable practice.

The strict adherence to filed-rate doctrine is not compatible with deregulation and the open market philosophy that the

ICC has encouraged. It only created a windfall for the lawyers and collection agents and hurts our economy and our global competitiveness.

I appreciate the opportunity to provide this testimony to you.

Respectfully,

Fred M. Brody,
President,
Fred M. Brody &
Associates, Inc.

STATEMENT OF:

Donald J. Sooy
President
FTS INDUSTRIES, INC.
Somerville, NJ

I N T R O D U C T I O N

I am Donald J. Sooy, President of FTS Industries, Inc.; 58 Chambers Brook Road; Somerville, NJ 08876.

I am a member of the Board of Directors of the Transportation Brokers Conference of America, as well as the First Vice President of this organization.

FTS Industries, Inc. employs approximately 90 people conducting operations through its two subsidiaries:

(1) Freight Traffic Services

A full service transportation consulting firm which has been in business since 1963. Freight Traffic Services has employees which include transportation specialists licensed to practice before the Interstate Commerce Commission, as well as the Federal Maritime Commission, certified cargo claims specialists, and numerous other technically oriented people with up to 40 years of experience in the transportation industry.

Freight Traffic Services provides a complete range of transportation consulting services to the shipping public. Chief among these services provided, is the audit and payment of freight bills.

Other services provided by Freight Traffic are:

- The development and preparation of routing guides
- Post audit of freight bills
- Site selection studies
- Preparation of bills-of-lading
- Classification of commodities
- The filing and collection of cargo claims

The above is an example of the services offered which include any type of traffic and transportation need required of the shipping public.

(2) Intermodal Consolidating Services, Inc.

This is a property broker, licensed by the Interstate Commerce Commission to arrange for transportation throughout the United States. ICS obtained its license from the Interstate Commerce Commission in 1979, shortly after the regulations surrounding property brokers were relaxed, thereby permitting greater and freer entry into this field.

As a result of the Motor Carrier Act of 1980, the demand for the services (property brokering) provided by ICS, escalated significantly. The relaxation of entry standards into the property motor carrier field, resulted in the influx of numerous additional motor carriers, as well as the expansion of most of those in existence at the time of the Motor Carrier Act of 1980. The vast preponderance of the new entries and the expansion of the existing ones, involved small carriers who greatly needed the services of entrepreneural property brokers who could provide them with business to support their new or expanded operations.

In addition to bringing greatly needed reform and substantial economies to the transportation industry, the Motor Carrier Act of 1980 also spawned a host of small entrepreneural firms numbering in the thousands who now operate as either motor

carriers and/or property brokers serving the shipping public throughout the country in a most efficient and economical manner. Freight rates and charges have been reduced and the time in transit service has been greatly improved since the Motor Carrier Act of 1980. Undoubtedly, all of these efficiencies and economies have been primarily achieved by small firms such as ourselves and small motor carriers who have interjected the much needed competition into the transportation market.

(I) Summary Position

On June 21, 1990, the United States Supreme Court in Maislin Industries, U. S. v. Primary Steel, in a 7-2 decision reversed the earlier decisions of twenty (20) Circuit Court of Appeals judges in seven (7) circuits, as well as condemned the stated policy of the Interstate Commerce Commission.

Specifically, the Supreme Court rejected the ICC's equity defense policy and upheld the so-called "Filed Rate Doctrine". The Filed Rate Doctrine requires transportation carriers to charge, and shippers to pay, strictly in accordance with tariffs published and on file with the Interstate Commerce Commission.

WHILE NO DOUBT THE SUPREME COURT ACTED WITH INFINITE LEGAL WISDOM, NEVERTHELESS THE NET EFFECT OF THE COURT'S ACTION IS TO IMPOSE UPON THOUSANDS OF SHIPPERS, PROPERTY BROKERS, AND OTHER PARTIES RESPONSIBLE FOR THE PAYMENT OF FREIGHT CHARGES, THE LEGAL REQUIREMENT TO PAY UPWARDS OF $200,000,000 IN ADDITIONAL FREIGHT CHARGES ABOVE AND BEYOND THE ORIGINAL FREIGHT CHARGES AGREED TO, ASSESSED BY, AND ORIGINALLY COLLECTED BY THE MOTOR CARRIERS.

TO ADD INSULT TO INJURY, IN MOST INSTANCES, THIS TOTALLY UNDESERVED AND IN SOME INSTANCES, BORDERING ON FRAUDULENT WINDFALL WILL BE REAPED NOT BY THE MOTOR CARRIERS WHO PROVIDED THE ORIGINAL TRANSPORTATION IN QUESTION -- BUT RATHER BY FREIGHT

AUDIT BUREAUS WHO HAVE NO STANDING IN THE ORIGINAL TRANSPORTATION CONTRACTS SINCE THEY ARE ACTING SOLELY IN THE SELF INTERESTS OF THEIR OWNERS AND AS SCAVENGERS OF THE BONEFIDE ESTATES OF BANKRUPT MOTOR CARRIERS. THE PRIMARY BENEFICIARY OF THE SUPREME COURT'S DECISION--AND THE ONES WHO WILL RECEIVE THE GOLDEN LARGESS WHICH WILL FLOW AS A RESULT OF THIS DECISION--ARE INDIVIDUALS WHO SERVE NO CONSTRUCTIVE PURPOSE IN THE TRANSPORTATION INDUSTRY. A VERY SMALL, SELECT FEW WILL BENEFIT AT THE EXPENSE OF THE MANY WHO ACTED IN GOOD FAITH AND WERE FURTHER MISLED BY THE MOTOR CARRIERS REGARDING FREIGHT RATE AGREEMENTS.

CONGRESS MUST ACT SWIFTLY TO REVERSE THE PROCESS THAT HAS BEEN UNLEASHED BY THIS DECISION, EVEN AS WE SPEAK. SPECIFICALLY, COLLECTION AGENCIES AND FREIGHT AUDIT BUREAUS HAVE ALREADY STEPPED UP THEIR ACTIVITIES THREATENING LITIGATION (WHICH WILL BE UPHELD BY THE SUPREME COURT'S DECISION) TO COLLECT THE HUNDREDS OF THOUSANDS OF BALANCE DUE BILLS WHICH HAVE BEEN HELD IN ABEYANCE OVER THE PAST FEW MONTHS AWAITING THE SUPREME COURT'S DECISION. UNLESS CONGRESS ACTS IMMEDIATELY TO REVERSE THIS GROSS MISCARRIAGE OF JUSTICE, THE ONLY SINGLE EVENT WHICH WILL MONETARILY EXCEED THE DEVASTATION TO BE WROUGHT, WILL BE THE SAVINGS AND LOAN DEBACLE NOW BEING CLEANED UP AT THE EXPENSE OF THE U. S. TAXPAYER.

THE MOTOR CARRIER ACT OF 1980 WAS ENACTED TO BRING ABOUT REFORM IN THE TRANSPORTATION INDUSTRY AND TO ELIMINATE THE GOVERNMENTAL BUREAUCRACY AND LEGALITIES WHICH HOBBLED THE INDUSTRY. IT SOUGHT TO TAKE TRANSPORTATION IN OUR COUNTRY INTO THE TWENTY-FIRST CENTURY. IF IT IS NOT REVERSED, IMPOSITION OF THE "FILED RATE DOCTRINE" WILL DESTROY ALL OF THE ECONOMICAL BENEFITS WHICH THE SHIPPING PUBLIC HAS RECEIVED AND ENJOYED AS A RESULT OF THE MOTOR CARRIER ACT OF 1980.

I SINCERELY BELIEVE THAT THE VERY LIVELIHOOD OF BOTH MYSELF AND MY 90 EMPLOYEES WILL BE DETERMINED BY THE ACTION OR INACTION OF CONGRESS IN ADDRESSING THIS MONUMENTAL PROBLEM. ALL OF US URGE AND PLEAD FOR YOUR HELP IN PRESERVING OUR JOBS.

II. U. S. Supreme Court Decision in Case 89-624 Maislin Industries U. S. v. Primary Steel

While the Supreme Court's 7-2 decision upholding the "Filed Rate Doctrine" and its condemnation of the Interstate Commerce Commission's policy in finding that the collection of tariff charges under these circumstances constitutes an unreasonable practice. Nevertheless, the majority in the decision went out of their way to point out the following:

> "The filed rate is not enforcable if the ICC finds the rate to be unreasonable."

In oral arguments before the Court, opponents to the Filed Rate Doctrine argued that:

> "When the reason for the law no longer exists, the law itself no longer exists."

Indeed the two dissenting justices contended that competitive realities in the transportation marketplace had changed substantially because of re-regulation and that therefore the Filed Rate Doctrine was no longer required to avoid price discrimination by motor carriers. In fact, they argued that the Filed Rate Doctrine was no longer effective in accomplishing this task.

It is more than obvious from a reading of the Supreme Court's decision that legal realities demanded the decision which they rendered. However, they too appear to have recognized from the record that:

> The reason for the law no longer exists, however, as long as the law itself exists, it is their duty to uphold it. It is Congress' duty to change it.

III. Re-Regulation or De-Regulation: That Is The Question

The Motor Carrier Act of 1980 which was enacted after substantial hearings throughout the country and notwithstanding the enormous lobbying efforts of the then encumbant motor carrier establishment, which sought to retain the mantle of government protection and guarantees against failures.

It was clearly the intent of the majority to significantly reduce the amount of onerous government regulation, which at that point in time was severely limiting the efficiency of the motor carrier industry. Most of the predictions concerning savings to the shipping public in the billions of dollars, have come to pass. For the most part, service of motor carriers has never been better and rates and charges (prior to the recent Supreme Court decision) have been highly competitive and economical to the shipping public. The Motor Carrier Act of 1980 has been lauded in numerous circles for having obtained the highest aspirations envisioned at the time of its passage. Literally billions of dollars annually have been cut from the nationwide transportation bill.

Unfortunately, even though the Act was touted in the media and many quarters as "The Deregulation Bill", in fact Congress retained the tariff filing requirements of motor common carriers. There were many in transportation, both carriers and shippers who failed to recognize this technicality. The atmosphere immediately following the Motor Carrier Act of 1980, and for the next seven or eight years thereafter, was one of "total deregulation". Motor carriers were offering and shippers were accepting verbal and written rate quotations and discount provisions which were never ultimately published nor filed by the motor carrier in question. These practices became pervasive throughout the industry. While there were those few voices "crying in the wilderness", cautioning participants against accepting verbal and/or written rate quotations from motor carriers without publication and filing with the Interstate Commerce Commission, perhaps the vast majority of those in transportation were acting as if the media hype was correct. That is, they were acting as if the Motor Carrier Act had "totally deregulated" the motor carrier industry.

It was not until years afterwards when the first motor carriers either liquidated or went bankrupt did the magnitude of the severe problem facing the shipping public surface. That is to say that rate audit bureaus of behalf of Trustees in bankruptcy for motor carriers began submitting balance due bills in the hundreds of millions of dollars demanding payment of legally filed tariff rates as opposed to the rates and charges agreed upon between the carrier and shipper and in fact, assessed by the carrier and paid by the shipper. Surely it was not the intention of Congress that a few rate audit bureaus should enjoy unjust enrichment at the expense of the shipping public.

The stated purpose of the Motor Carrier Act of 1980 was to lift the burdens of government and technicalities which had been foisted upon carriers and industry for 45 years. Not to entrap

the public into believing in deregulation, only to find out years later that the legislators had not crossed their "i's" nor dotted their "t's".

Deregulation was the stated purpose of the changes which occured in 1980. However, as was pointed out by Justice William J. Brennan in the Supreme Court decision:

> "If strict adherence to the tariff filing requirements as embodied in the Filed Rate Doctrine has become an anachorism in the wake of the Motor Carrier Act, it is the responsibility of Congress to modify or eliminate these sections."

This, then is the question to be considered by Congress. Was it the intention of the Motor Carrier Act of 1980 to deregulate or to entrap the shipping public? If it was to deregulate, which must be the conclusion of any observer--including the Supreme Court--then as Justice Brennan wrote, it is the responsibility of Congress to eliminate the tariff filing requirement and to nullify the effect of the Filed Rate Doctrine immediately.

Respectfully submitted,

Donald J. Sooy

Donald J. Sooy
President
FTS INDUSTRIES, INC.

STATEMENT OF

DONNA R. McCANN

PRESIDENT OF McCANN'S TRANSPORTATION, INC.

My name is Donna R. McCann. I am president and chief executive officer of McCann's Transportation, Inc., an I.C.C. licensed transportation brokerage founded in 1983 and headquartered at 1021 South 39th St., St. Louis, Missouri.

In addition to McCann's Transportation, Inc., I own McCann's Piggyback Consolidation, Inc., founded in March, 1980, which is one of the largest shipper's agent operations in St. Louis. I also own Balde Eagle Transportation Services, Inc., a spotting service founded in 1989. I have more than 43 employees and my companies have enjoyed consistent growth each year.

My brokerage operation is a member of the Transportation Broker's Conference of America, which promotes professionalism and education in the industry. I have been an active member of the TBCA, and currently serve as president.

Our companies are successful because the Motor Carrier Act of 1980 freed the transportation industry from much of the regulation that had strangled if for half a century. In the new competitive environment, contract carriers and brokers were allowed to negotiate mutually advantageous rates, eliminating dead hauls and providing shippers with more options. Consequently, the efficiency and responsiveness of the industry has risen steadily over the last decade while prices declined.

A dark cloud has appeared on the horizon -- I now face the prospect of being driven into bankruptcy for actions completely beyond my control - undercharge claims.

Unethical collection agencies are engaging in legalized theft by ferreting out technicalities in an antiquated law known as the filed rate doctrine.

The scenario is simple. A common carrier offers to move freight for me at a rate discounted from their filed tariff. I accept the offer, with the carrier's promise to file the negotiated

rate with the I.C.C.. Because of the dynamic nature of the industry, it is not feasible to wait for a written confirmation from the I.C.C., which takes several days. The carrier bills the agreed-upon rate, I pay it, and everyone is satisfied.

Later, the carrier (or a collection agency, if it has gone bankrupt) sues me for the "balance due," because the carrier reneged on his promise to file the negotiated rate. I am being penalized for the carrier's dishonesty and/or negligence.

Perhaps the following analogy will make the problem clearer. A dealer offers you a new car for $1000 less than the sticker price (which is artificially high), which you accept and pay for. Everyone is pleased with the deal, and you forget all about it.

Several years later, you are sued for the $1000 discount you were offered, because the dealer never filed the new price as promised. You'd be fit to be tied, especially if the courts ruled that the unscrupulous dealer was unjustly - yet legally - entitled to the additional money.

Now, imagine your frustration if you ran a car resale shop, and hundreds of undercharge lawsuits threatened to drive you to bankruptcy. That's how my fellow brokers and I feel.

The filed rate doctrine is an anachronism in today's marketplace. The law was intended to <u>protect</u> brokers, shippers and the consuming public. Today, however, the filed rate doctrine is being used by carriers and collection agencies to <u>victimize</u> brokers, shippers and the consuming public. The filed rate doctrine protects no one and adds significant cost to our nation's transportation system.

The rates on file at the I.C.C. are meaningless remnants of a bygone age. The rates are unreasonably high - much more than expenses warrant or the market will bear. If they were realistic, carriers would not be negotiating discounts in the first place.

The I.C.C. has consistently ruled that "balance due" claims are unreasonable, and that common carriers should not be rewarded for their negligence and/or premeditated deceit. Several courts of

appeal concurred with the I.C.C.'s decision.

In the Maislin case, however, the Supreme Court ruled that although filed rate laws were unjust, they are the law, and must be followed. They noted that the solution could only come from the nation's legislators.

That is why my fellow brokers and I are here today. We don't want special favors of you, we ask only for a fair deal.

The law currently rewards negligence, and it is the lawmakers' responsibility to stop this injustice by rewriting the law. Congress must immediately enact legislation that acknowledges the legitimacy and lawfulness of a negotiated rate. We ask Congress to relieve brokers and shippers from the strict obligation to pay the filed rate and grant the I.C.C. the authority to afford such relief.

Congress cannot afford the luxury to appoint committees or investigative groups to look into this. Each day's delay may cost another honest entrepreneur his business - and his life's savings.

I appreciate the opportunity to provide this testimony to you.

Respectfully,

Donna R. McCann
President
McCann's Transportation, Inc.

Statement of Ronald A. Sarasin, President
National Beer Wholesalers Association

Before the Subcommittee on Surface Transportation of the
Senate Committee on Commerce, Science and Transportation
July 17, 1990

Mr. Chairman and members of the Subcommittee, thank you for this opportunity for me to register the concern of beer wholesalers with respect to the negotiated rate problem in the motor carrier industry. We believe many of our members' companies, while not having a unique story to relate, are a good collective example of how the "Catch 22" created by the motor carrier rate undercharge issue has had a potentially devastating impact on many small businesses.

The majority of the four-thousand beer wholesale companies in cities and towns throughout the country are small, family-owned and operated businesses. Transportation plays a very important role in the day-to-day conduct of their business, principally in the form of supply of product from regionally-sited breweries to beer wholesalers. More often than not, these shipments move in interstate commerce.

While the beer wholesaling business is transportation intensive, you could not describe management as being expert in all the nuances of transportation law and regulation. Terms such as unpaid tariff charges and filed rate doctrine are being heard by some beer wholesalers for the first time during motor carrier bankruptcy proceedings. Similarly, legal advisors to our member companies do not necessarily have expertise in transportation law. In other words, Mr. Chairman, our members may engage in substantial amounts of business with motor carriers, but it is entirely possible that their total knowledge of the changes made or not made by the Motor Carrier Act of 1980 amounted to zero until the rate undercharge cases rudely awakened them.

Beer wholesalers may not be experts in transportation law, but they know an injustice when they see one. Let me quote from a letter written by Pete Haralson, a beer wholesaler in LaGrange, Georgia, who was sued for $12,247.31 for past undercharges. Pete writes:

> *". . .we have fought this suit for over two years, spent over $10,000 in legal fees, and countless hours of time because it just ain't right to pay these vultures. Everyone always states pay don't go to court; however, sometime you need to stand up for what is right."*

Other beer wholesalers face much larger liability; for example, Ed Perry, a beer wholesaler in Augusta, Georgia, who dealt in good faith with his carrier but now is confronted with a bill of more than $100,000 for so-called undercharges. I have no doubt that beer wholesalers across the country face similar

liabilities although they may not yet be aware of it.

Mr. Chairman, to give the Committee a better understanding of the problem, I would like to ask that a number of letters from Georgia beer wholesalers be printed as part of the hearing record.

Mr. Chairman and members of the Subcommittee, if, during your consideration of the problem, you are tempted to conclude that the mess created by rate undercharges is the result of haggling over price between scofflaw shippers and carriers, I hope you will counter this temptation by recollecting the beer wholesaler experience. I would like to use the balance of my time profiling several characteristics of brewer-wholesaler-motor carrier transportation arrangements which justify the type of relief provided by the bill.

1. Common v. Contract Carriage. The constant flow of traffic between brewers and wholesalers has resulted in utilization of all shipper carrier options. We have found that many of our members utilize contract and common carriage to meet their needs. Because wholesalers order truckload and less-than-truckload shipments, we are finding that, since 1980, our members may have utilized the same carrier for both common and contract carriage. Unaware of any pitfalls between the two options, a wholesaler asking for a contract rate with a similarly uninformed common carrier may have been told, "It's easier for me to bill you per one-hundred weight for the same price", thereby triggering shipper liability for rate undercharges.

2. Ghost Carriers/Real Liability. I repeat, it is incumbent upon the beer wholesaler to arrange for transportation of his shipments from the brewery. However, this does not mean that a shipment always moves by a carrier designated by the wholesaler. We are finding that, in the interest of efficiency and responsiveness to wholesaler orders, brewery shipping docks often consign shipments to the first available carrier. The brewery-selected carrier must agree to a rate specified in the original order. Thus, the wholesaler has incurred liability to a carrier he has never negotiated with and perhaps never heard of. Therefore, our member companies are unaware of the extent of liability they have incurred through their own activity, and are certainly unaware of potential liability incurred without their participation.

3. America's Warehouse. The for-hire trucking industry -common and contract carriage- has been termed "America's Warehouse on Wheels" Since the passage of the Motor Carrier Act in 1980, the "Warehouse" has been reinforced by computer applications, telecommunications enhancements and satellite tracking systems that have made common carriage even more important to small business inventory management. Beer wholesalers, who deal with food product inventories with a limited shelf life, rely on the entire "Warehouse on Wheels" -common and contract carriage- to serve their transportation and inventory management needs. To have access to one part of the system without the other, would certainly be turning back the

clock. However, Mr. Chairman, as we sit here this morning, an older and smarter beer wholesaling industry (ten years older and made smarter by millions of dollars in claims) is spreading the word like wildfire: "Use contract carriage!" Only through contract carriage is the problem of rate undercharge liability avoided. This is a sad commentary, because common carriage has been responsive to the needs of our members. We are hopeful that the Committee will move legislation which redresses the wrong that confronts our members who have incurred financial liability for rate undercharges and restores our confidence in the common carrier segment of our motor carrier transportation system.

Thank you for this opportunity to testify.

GENERAL TRANSPORT & CONSULTANTS INC.

708 Killian Road, Akron, Ohio 44319 (216) 645-6055 Watts 1-800-678-6055

July 12, 1990

TO: The Senate Subcommittee on Surface Transportation

This letter is in regards to the July 17th hearings on the Negotiated Rates Issue. The recent decision by the Supreme Court is going to have extreme ramifications on the brokerage industry, and in particular, small companies like General Transport & Consultants, Inc.

General Transport & Consultants, Inc., is a privately held brokerage operation based in Akron, Ohio since July of 1984. We provide truckload and large LTL services to our customers along with special services such as freight management, freight bill auditing, claim auditing and carrier negotiating. I feel that General Transport & Consultants, Inc., and the brokerage industry in general are a viable part of the transportation industry of this country.

General Transport & Consultants, Inc., is making a request for immediate legislation overturning the Maislin Decision and affirming the primary jurisdiction of the ICC in settling these "negotiated vs. filed rates" claims.

Sincerely,

GENERAL TRANSPORT
& CONSULTANTS, INC.

Daniel B. Rafferty
Vice President

AMERITRANS, INC.™
NATIONWIDE TRANSPORTATION SERVICES

July 10, 1990

United States Senate Hearing Clerk
SR-254 Russell Senate Office Building
Washington, District of Columbia 20515

VIA: Federal Express
AIRBILL #8112296765

Reference: Support for Negotiated Rates in the Trucking Industry and H.R. 3243

Dear U. S. Senators:

Ameritrans, Incorporated is a Texas Corporation and Interstate Commerce Commission (ICC) licensed property broker operating under authority granted to it by the commission on June 17, 1985. (MC#182108)

Since its inception, Ameritrans has been engaged in the coordination of truckload transportation brokerage services. Presently our carrier database consists of a sum total of 826 active carriers which possess common, contract irregular route type authority respectfully. (Vans and Reefers 406; Flatbeds 420)

Pursuant to the 1980 congressional move to deregulate the trucking industry, the concept of Ameritrans has grown from 0 revenues in 1985 to approximately a 7 million dollar operation. Not only are myself and my partner intimately involved in this issue but the fifteen people we employ are as well as any decision relevant to this issue will have definitive economic effect on their livelihoods.

Ameritrans, Inc. strongly supports the Transportation Brokers Conference of America's (TBCA) position on this issue and strongly urge you to act promptly to enact immediate and retroactive legislation which would overturn the recent Maislin Decision and affirm the primary jurisdiction of the ICC in settling these "negotiated vs. filed rate" claims. We have already received some, and we anticipate being wrongfully inundated with more, of these wholly inappropriate balance due payment demands.

If you desire true competition among the nations carriers which will enhance free enterprise, offer a higher quality of service, in conjunction with a wider variety of choices, all at a lower cost, you will take the necessary steps to allow our industry to prosper. If however, you do not want competition then go ahead and shoot us, because our industry provides a critical information clearing house so that millions of shippers and consignees can shop effectively among the thousands of carriers available. Otherwise, you will stagnate the transportation industry.

We do appreciate your time and consideration of our dilemma. Again, we do urge your swift and immediate response to our plea. Thank you for your time and consideration.

Very truly yours,

Bob McLeod

AMERITRANS, INC.
Bob McLeod
President

David C. Royal

AMERITRANS, INC.
David C. Royal
Vice President

ACROPOLIS
TRANSPORTATION
SERVICES, INC.

MC-196562

July 11, 1990

Senator J. James Exon - Chairman
Senate Surface Transportation Sub Committee
Hart Building, 2nd and C Streets NE
Room 428
Washington DC 20510

Dear Chairman Exon;

My name is Gary Matthews and I am writing on behalf of:

Acropolis Transportation Services, Inc.
PO Box 3300
Elizabeth, NJ 07207

ATS is an ICC property broker since 1986 and we wish to have our views entered as testimony in your review of Maislin Industries, U.S., Inc v. Primary Steel, Inc..

Our company exists thanks to the change of regulatory climate resulting from the Motor Carrier Act of 1980. The spirit of this legislation allowed innovative individuals an opportunity to develop a service business, bringing efficiencies and cost reductions to a market place crying for relief since the Motor Carrier Act of 1935.

As a broker, we enter into general contracts with each of the 300 to 350 carriers we work with. These carriers are common or contract carriers with many holding dual authority. With each transaction we also execute a specific contract listing the origin, destination and specific negotiated rate for the transaction.

With the recent Supreme Court decision in the Maislin Case, we can no longer feel protected by the contractual agreements we've entered into in good faith. As a small business we now are threatened with the high cost of defending ourselves from the "pirates" who add nothing of value to the commerce of transportation but feast off the bones of failed motor carriers. Additionally, we are threatened by viable carriers who see an opportunity to turn their past negotiated transactions into undeserved cash, by using higher filed rates with the ICC as a basis to attack brokers they no longer work with.

Only through passage of legislation overturning the Maislin decision can the "free market" spirit of the Motor Carrier Act of 1980 be restored. I encourage your committee to strongly consider legislation similar to HR 3243.

Sincerely yours,

Gary Matthews
Vice President/
General Manager

WESTGATE TRANSPORTATION, INC.
TRANSPORTATION MANAGEMENT CO.

2710 Schoenersville Rd.
Suite 114
Bethlehem, PA 18017
215-866-8001
800-637-8001
FAX 215-866-3775

July 12, 1990

U. S. Senate Hearing Clerk
SR-254 Russell Senate Office Building
Washington, DC 20515

Attention: Senate Hearing Clerk

As an ICC licensed property broker, I am extremely concerned about the recent Supreme Court decision in the Maislin vs. Primary Steel Case.

Westgate Transportation, a full service transportation broker began operations in 1983, with the purpose of providing shippers and receivers within our region an opportunity to access a variety of previously untapped transportation resources, which became available as a result of the Motor Carrier Act of 1980.

In arranging transportation services for our clients, we take into consideration the best price/service combination for each individual transaction. Our clients have come to trust our judgement in the selection of carriers to meet their needs and as a result these smaller shippers have been able to purchase transportation services at cost comparable to those of major shippers. Considering our clients trust, we have been selective in our carrier base. About fifty percent of the freight movements arranged by Westgate Transportation are handled by private fleets holding contract carrier authority. This type of transportation has proven to be extremely reliable in every aspect and we can rest assured that our client's cargo is in good hands. By and large, the majority of our carrier relationships are contractual; however, for a variety of needs, we have been forced to deal with some carriers on a common carrier basis.

Because of the Maislin Decision, one can only speculate as to the millions or perhaps billions of dollars in undercharge claims that could face shippers, receivers and taxpayers in general. The only beneficiaries of this decision are the bankruptcy attorneys, the collection agents and their attorneys.

I urge you to formulate immediate legislation, overturning the Maislin Decision and affirming the primary jurisdiction of the ICC in settling these "negotiated vs. filed rate" cases.

Sincerely,

Thomas A. Fiorini
Vice President

TAF:bd

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Paul A. Korody
Vice President
Government Affairs

July 19, 1990

Honorable J. James Exon
United States Senate
Washington, D.C. 20510-2702

Dear Senator:

ConAgra, Inc. strongly supports enactment of legislation to put an end to the motor carrier undercharge problem that was the subject of hearings before your Surface Transportation Subcommittee.

As you know, ConAgra is a diversified family of companies operating across the entire food chain. Its products range from supplies used by farmers to convenient prepared foods for today's busy consumers. ConAgra is a major user of all modes of transportation in support of its production and distribution operations. Although its payments for transportation services run into the hundreds of millions of dollars each year, those charges are incurred in a wide range of circumstances. We may ship thousands of tons of fertilizer or grain to or from a single location but we also have occasion to make truck shipments of much smaller quantities of food ingredients to or from facilities that do not have sufficient volume to justify full- time transportation specialists.

ConAgra, like thousands of other shippers, has been the victim of undercharge claims asserted by collection agencies purporting to act on behalf of the estates of bankrupt carriers. To date, more than twenty such claims with an aggregate volume approaching one million dollars have been asserted against ConAgra and its operating subsidiaries. We have been forced to spend thousands of dollars in defending them. Each of these claims is based on allegations that the rates quoted to ConAgra and relied on by ConAgra and accepted as payment in full by the carriers were never properly filed by the carrier at the ICC. As a consequence of that failure, the collection agencies are demanding additional payments of rates contained in tariffs that were never mentioned to ConAgra and at which ConAgra never would have shipped any traffic.

ConAgra has never knowingly accepted transportation service at rates other than those for which the carrier has complied with applicable tariff filing requirements. However, because of its heavy volume of traffic (ConAgra makes more than 5,000 truckload shipments each week from scores of different locations), it would be virtually impossible to verify every carrier's full regulatory compliance with respect to every rate quotation that ConAgra receives.

Typical of the claims asserted against ConAgra are those which are the subject of a lawsuit in the U.S. Bankruptcy Court in Detroit. They involve shipments of flour from our mill at Hastings, MN. That mill already was being serviced by several motor carriers when our manager was approached by a sales representative from a motor carrier operating under the name of Centennial Trucking Company. The Centennial representative asked if his company could participate in our traffic and was told that if its rates were comparable to those of the carriers already serving the mill, Centennial would be given a chance to see if they could provide a responsive service. Centennial produced a schedule of rates that were comparable to or, in some instances, slightly higher than those of the other carriers serving the mill. ConAgra began to use Centennial and because it was able to promptly provide equipment for loading because of the close proximity of its terminal to our mill, we gradually began to use it more extensively. We were always billed at the rates that were quoted to us and payment of those rates was always accepted by Centennial as payment in full.

Centennial was apparently acting on behalf of a subsidiary of Maislin Industries, U.S., Inc. in soliciting our traffic. Sometime after Maislin and its subsidiaries went bankrupt, Carrier Credit and Collection Corporation, wrote to us stating that Centennial had never properly filed tariffs with the ICC containing the rates under which it had been transporting our traffic for several years. It rerated our shipments in accordance with rates under which we never would have used Centennial's services. In some instances they were double the rates that we had been paying Centennial and the other carriers serving our Hastings mill. In fact, in some instances, they are more than double the rates that we are paying other carriers today, some five years later, for the same service that Centennial provided to us.

When Carrier Credit and Collection sued us on behalf of the Maislin estate we were able to get the case referred to the ICC over the vigorous opposition of Carrier Credit and Collection. The ICC after receiving and reviewing thousands of pages of

testimony and exhibits found that the Maislin estate was entitled to nothing. The Bankruptcy Court in Detroit recommended the dismissal of the claims but believes the District Court could act on that recommendation the Supreme Court granted certiorari in Maislin Industries, U.S., Inc. v. Primary Steel, Inc. As a result of the Supreme Court's decision issued in that case on June 21, 1990, the District Court is now precluded from dismissing the claims based on the ICC's expert evaluation of all of the evidence.

Because of the Supreme Court's decision, the ICC's power to provide a regulatory solution to this problem has been eviscerated. Legislation is required in order to make clear what the law was always understood to be prior to June 21, 1990, namely that the ICC, after consideration of all relevant facts and circumstances, can determine that collection of a filed rate would constitute an unreasonable practice in violation of 49 U.S.C. § 10701(a).

ConAgra supports the legislation that has been developed by various shipper and carrier organizations that was submitted as an attachment to the statement of George Connelly, Jr., who testified before the Subcommittee on behalf of the National Industrial Transportation League. ConAgra believes, however, that that proposed legislation should be modified in two respects prior to enactment.

The last sentence of the proposed now subparagraph (4)(1) to 49 U.S.C. 11705(b) should be modified to change the word "may" to "shall". As modified the sentence would read as follows:

> In instances where a civil action is brought to collect tariff rates or charges in addition to those originally billed and collected, the reasonableness of such practices shall be referred to and be determined by the Commission under its primary jurisdiction, the action shall be stayed pending that determination, and relief may be granted as provided above under Section 11705(b)(3).

This change will make clear that when an issue of unreasonableness is referred to the ICC, the parties will not be required to proceed with the resolution of other issues until the pivotal issue of unreasonableness is resolved. It makes no sense to require a shipper to be involved simultaneously in two

forums. Furthermore, in the interest of judicial economy a District Court should not be proceeding with the trial of an undercharge case until it is clear from the ICC's disposition of the unreasonable rates and practices issues that a trial is necessary.

Section 4(b) of the proposed legislation should also be amended to eliminate the 18 month limitation. The purpose of Section 1 of the legislation is to make clear the ICC's primary jurisdiction and its power to grant relief from carrier undercharge claims under appropriate circumstances. Although it is anticipated that such authority will be exercised extensively in the next year or so in the disposition of the thousands of claims that are currently pending, it is inevitable that at least some such claims will continue to be asserted in the future. The Commission should have the power to deal with these claims indefinitely. Even if it only has infrequent occasion to exercise that power, its mere existence will discourage the filing of spurious claims. Congress is far too busy to burden itself with having to reconsider this same matter two years from now.

We understand that some carrier interests have expressed concern about permanent legislation because it could be used by shippers to avoid prompt payment of legitimate freight charges. These concerns are unfounded. Section 1 of the proposed legislation is clearly limited only to situations where a carrier agrees to a rate and, accepts it as payment in full for services rendered and later comes back to the shipper seeking a higher rate. It would have absolutely no application to rates that are correctly billed in the first instance. If the carrier and the shipper make a mutual mistake, the carrier will presumably want to join the shipper in requesting relief from subsequently collecting a higher rate. Indeed, that is the purpose of Section 3 of the proposed legislation that was included at the behest of the carriers.

The importance of corrective legislation cannot be overemphasized. It is absolutely essential to preservation of the tremendous public benefits that have been generated by the competitive transportation marketplace mandated by Congress in the Motor Carrier Act of 1980. Transportation is a vital link in the ability of American industry to compete in world markets. If competition among truckers is inhibited, increased transportation costs will subject America's productive capacity to a serious handicap.

It makes no sense to permit motor carriers to compete aggressively for traffic by reducing rates on one day's notice if a shipper cannot prudently utilize those reduced rates

without first assuring their validity by obtaining confirmation from the ICC that they have been properly filed. For a company such as ConAgra, that makes thousands of shipments each week from many different locations, it would be virtually impossible to obtain such confirmation on a timely basis. The sheer volume of such confirmation requests would undoubtedly result in a response time of at least several days if not weeks. The problem would be at its worst at precisely those times when prompt service is needed the most. In the food business customer promotional activities cause surges in demand for products which must be delivered in time to meet the demand. Customers become very dissatisfied when they find that inventory of advertised specials is insufficient to meet demands. Avoiding that problem normally requires utilization of additional carriers with whom the shipper is not as familiar as those who serve it on a regular basis.

Even during periods of normal demand merchandise must be transported promptly because storage capacity for such items as frozen foods and fresh meats is extremely limited. Carriers must be utilized as their equipment becomes available. Thus, in the real world, it is simply not feasible to assure that every carrier that has equipment available to provide service on a particular day has complied with all regulatory requirements to which it is subject before using that equipment. Even if that type of investigation were possible, the time that it would require would seriously stifle the vigorous price competition among motor carriers which was the principal goal of Congress in enacting the Motor Carrier Act of 1980.

There are simply no countervailing public policy considerations that would justify legitimate opposition to the proposed legislation. The collection agencies that are filing and prosecuting the undercharge cases that are seriously burdening the courts are not motivated by support for the filed rate doctrine or any other legal principle. They are motivated solely and exclusively by greed. As long as they have a reasonable prospect of collecting on a reasonable number of claims, they will continue to file them. As soon as it becomes apparent that substantially all such claims will be referred to the ICC and that the ICC will determine that their collection is an unreasonable practice, the flood of undercharge cases will recede just as quickly as it arose.

In any case, the filed rate doctrine would remain intact after enactment of the proposed legislation. Shippers would continue to be presumed to know the filed rate and would have to pay it except in those instances in which the ICC, after careful consideration of all relevant evidence, determines that a carrier's rates or practices are so unreasonable as to warrant relief from the filed rate.

Finally, it is important to emphasize that creditors of bankrupt carriers have no equitable claim to additional payments from shippers. In just about every undercharge case in which an evidentiary record has been developed it has been established that the rates quoted by the carriers on whose behalf the undercharge claims are being asserted were comparable to or the same as those of other carriers participating in the shipper's traffic. If the carrier had quoted the higher rates now being claimed they never would have handled any of the traffic. Therefore, they lost no revenue by quoting and providing service at prevailing market rates.

For your convenience, there is enclosed a copy of the proposed legislation as modified for the reasons that we have described. We urge its prompt enactment. Needless to say, if you require any further information in connection with your consideration of this matter or if we can otherwise be of any assistance, please let me know.

Very truly yours,

Paul A. Korody

Enclosure
cc: Members of Committee